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THE EXTENSION CLAUSE AND THE SUPREME COURT'S JURISDICTIONAL INDEPENDENCE

ALEX GLASHAUSSER*

Abstract: This Article challenges the prevailing doctrinal, political, and academic view that the Extension Clause—which provides that “[t]he judicial Power shall extend” to nine types of cases and controversies—justifies legislative attempts to strip the U.S. Supreme Court of appellate jurisdiction. Legislators have repeatedly introduced bills seeking to prevent the Court from hearing cases on politically charged topics such as marriage, religion, and abortion. Scholars have relied on the Extension Clause to advance three arguments in support of such jurisdiction-stripping: (1) that “judicial Power” is not jurisdiction, and thus jurisdiction is not constitutionally protected; (2) that “shall” is not mandatory, and thus the clause need not be obeyed; and (3) that to “extend” a power is not to grant it but merely to define its potential outer reaches, and thus Congress is responsible for deciding what to allow the Court to hear. As the Article explains, however, the text, context, and drafting history of the Extension Clause reveal the fallacy of those conventional justifications. Just as other constitutional provisions guarantee the jurisprudential independence of federal judges so that they can do their jobs without fear of reprisal, the Extension Clause prevents Congress from taking certain cases away from the Supreme Court and thus secures the Court’s jurisdictional independence.

INTRODUCTION

Addressing Parliament in an October 1775 speech that unwittingly galvanized Americans’ resolve, King George III lamented that the rebels had “assumed to themselves legislative, executive, and judicial

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powers, which they already exercise in the most arbitrary manner.”¹ The next July, in his condemnation of British “Tyranny” over the colonies, Thomas Jefferson in turn charged that the king had “obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.”² Little could either foresee that after the Revolution was won and “[t]he judicial Power of the United States” constitutionally vested in “one supreme Court,”³ the power would again be unjustly obstructed—this time by the U.S. Congress. In countless bills through the years, including a string of recent ones on hot-button issues, American legislators have refused to assent to the full establishment of the U.S. Supreme Court’s appellate jurisdiction.⁴

A single month in 2011 is illustrative. On March 2, a group of fourteen U.S. representatives introduced the Marriage Protection Act, whose sole operative provision sought to prevent judicial review of the federal statute shielding states from having to recognize same-sex marriages: “[T]he Supreme Court shall have no appellate jurisdiction . . . to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of [the Defense of Marriage Act].”⁵ Six days later brought the We the People Act, an attempt to bar the Court from adjudicating “any claim involving . . . the free exercise or estab-

¹ DAVID McCULLOUGH, 1776, at 11, 67–68 (2005) (noting the impact of Americans’ reading of the speech in print early in 1776).

² THE DECLARATION OF INDEPENDENCE paras. 2, 10 (U.S. 1776).

³ U.S. CONST. art. III, § 1.

⁴ See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 872 (2011) [hereinafter Grove, *Structural Safeguards*] (referring to “[c]ountless bills” in the past century that would have stripped the Supreme Court of jurisdiction in cases about issues “ranging from reapportionment to the use of ‘under God’ in the Pledge of Allegiance”). Tara Grove has exhaustively grouped jurisdiction-stripping attempts by era, *id.* at 888–916, and analyzed the political and constitutional reasons that most such efforts fail, *id.* at 916–32 (concluding that “structural safeguards” in Article I were designed to, and have in fact served to, protect the Supreme Court’s power). See also Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 260–68 (2012) [hereinafter Grove, *Article II Safeguards*] (explaining incentives for the executive branch to oppose the legislature’s jurisdiction-stripping proposals). For other historical overviews of jurisdiction-stripping bills, see Dawn M. Chutkow, *Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts*, 70 J. POL. 1053, 1061–63 (2008) (empirically analyzing hundreds of enacted bills and concluding that Congress restricts federal jurisdiction for reasons of efficiency rather than ideology); Alex Glashauser, *A Return to Form for the Exceptions Clause*, 51 B.C. L. REV. 1383, 1386–87 (2010) (briefly recounting trends); Helen Norton, *Reshaping Federal Jurisdiction: Congress’s Latest Challenge to Judicial Review*, 41 WAKE FOREST L. REV. 1003, 1007–10 (2006) (summarizing bills since the 1820s).

⁵ H.R. 875, 112th Cong. § 2(a) (2011); see Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)).

lishment of religion; . . . the right of privacy, including . . . reproduction; or . . . the right to marry without regard to sex or sexual orientation.”⁶ A week after that came the Sanctity of Life Act, aiming to stop the Court from reviewing any laws or practices regulating abortion.⁷

Though most jurisdiction-stripping bills fail,⁸ their recurring threats are Damoclean, and sometimes one of the bills becomes law. For example, the Detainee Treatment Act of 2005 barred federal courts from exercising “jurisdiction to hear or consider” habeas corpus petitions filed by “enemy combatant[s].”⁹ Three years after its enactment, that statute was struck on the specific ground that it violated the Suspension Clause of Article I of the U.S. Constitution (protecting the writ of habeas corpus),¹⁰ but the more general issue of congressional control of the Supreme Court’s jurisdiction is timeless.¹¹ Given that the jurisdiction and even existence of inferior courts are constitutionally precarious,¹² the stripping of jurisdiction from the Supreme Court could leave state courts as the protectors of federal rights. Thus, even beyond the evident separation-of-powers implications of one branch’s control of another, the issue is also one of federalism.

Article III of the Constitution provides that “[t]he judicial Power shall extend” to various types of cases and controversies.¹³ Despite the

⁶ H.R. 958, 112th Cong. § 3 (2011).

⁷ H.R. 1096, 112th Cong. § 3(a) (2011); see Maggie McKinley, Note, *Plenary No Longer: How the Fourteenth Amendment “Amended” Congressional Jurisdiction-Stripping Power*, 63 STAN. L. REV. 1213, 1214–16, 1242 (2011) (citing the bill as a prime example of a jurisdiction-stripping attempt that runs afoul of the Fourteenth Amendment).

⁸ See Grove, *Article II Safeguards*, *supra* note 4, at 268–86 (outlining the reasons for the failure of such bills across four distinct political eras); Grove, *Structural Safeguards*, *supra* note 4, at 871–83 (sketching the political dynamics that defeat most such bills); cf. JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 145 (2009) (contending that as long as the Supreme Court retains broad supervisory authority over inferior courts, particular instances of jurisdiction-stripping pose “little threat”).

⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (codified at 28 U.S.C. § 2241(e)(1) (2006)), *invalidated by* Boumediene v. Bush, 553 U.S. 723 (2008).

¹⁰ *Boumediene*, 553 U.S. at 732–33; see *infra* text accompanying notes 73–78 (discussing the context of the Court’s decision).

¹¹ The question of the extent to which Congress may restrict the Court’s jurisdiction has been called “one of the most difficult in the law of the federal courts.” Mark Tushnet, *“The King of France with Forty Thousand Men”*: Felker v. Turpin and the Supreme Court’s Deliberative Processes, 1996 SUP. CT. REV. 163, 164.

¹² U.S. CONST. art. III, § 1 (giving Congress discretion about whether to “ordain and establish” inferior courts); see also *infra* note 142 (speculating about whether congressional control over the existence of inferior courts includes complete control of their jurisdiction).

¹³ U.S. CONST. art. III, § 2.

revolutionary resonance of the “judicial Power,” however, that phrase has supplied one of the chief academic justifications for the usurpatory bills. Scholars have argued that the “judicial Power” is not coextensive with “jurisdiction” and thus that although the Court’s judicial power *per se* is inviolate, its jurisdiction may be stripped.¹⁴ Such disingenuous differentiation would have confounded Jefferson, who objected not only to the denial of “Judiciary Powers” to the colonies but also to Britain’s attempts to “extend an unwarrantable *jurisdiction* over us.”¹⁵

The verb in that accusation—“extend”—has been coopted for a second defense of the bills. The “exten[sion]” of the judicial power, some scholars insist, merely sets a ceiling that limits the potential reach of the power.¹⁶ Under that view, the decision about the “exten[t]” to which the Supreme Court should be entrusted with the judicial power, up to that limit, is left to Congress.¹⁷

A third pillar of scholarly support has been the common contention that the constitutional “shall” (in “[t]he judicial Power shall extend”) is not mandatory and allows room for legislative discretion about how much jurisdiction the Court should have.¹⁸ Thomas Paine

¹⁴ E.g., James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 708, 751–52 (1998) (noting “confidently” the drafters’ distinction between the terms and concluding that “the ‘Judicial Power shall extend to’ language could not mean ‘jurisdiction shall be’”); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1573 n.14 (1990) (citing with approval a comment from a representative in the First Congress that “the failure to give the federal courts jurisdiction does not divest them of the judicial power”); Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 705 n.167 (1997) (“At most, the judicial power automatically extends to all such cases. *Jurisdiction* does not.”).

¹⁵ See THE DECLARATION OF INDEPENDENCE paras. 9, 31 (U.S. 1776) (emphasis added).

¹⁶ E.g., Liebman & Ryan, *supra* note 14, at 721–23, 753.

¹⁷ E.g., John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 212 (1997) (defending the traditional view based on a paraphrasing of the Extension Clause as “The judicial power may be used to decide . . .” or “The judicial power shall be capable of deciding . . .”); Liebman & Ryan, *supra* note 14, at 721–23, 753 (arguing that the editing of the clause about cases and controversies from “shall be” to “shall extend” changed the jurisdictional floor to a ceiling); Velasco, *supra* note 14, at 703–04 (citing a dictionary definition of “extend” to support the claim that Congress’s right to control jurisdiction stems from a “natural reading of the text of the Constitution”).

¹⁸ E.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 37–38 (2d ed. 1990) (casting doubt on whether “shall” implies a mandate as opposed to the future tense); Harrison, *supra* note 17, at 212, 217 (deriding the notion that the Extension Clause’s “shall” means “must” and paraphrasing the clause as “The judicial power may be used to decide . . .”); Velasco, *supra* note 14, at 702–04 (arguing that “shall” is not mandatory and concluding that “the words ‘shall extend’ are more permissive than mandatory; they are better interpreted as ‘can include’ rather than as ‘must in-

might have seen the lack of sense in that claim. His 1776 rejection of monarchical rule relied on the biblical verse “The Lord *shall* rule over you,” explicated by his own apt commentary: “Words need not be more explicit.”¹⁹

The explicit words of Article III, along with their context and history, show that the truth of the three apologies for legislative arrogation is far from self-evident. As bills aimed at shielding sensitive statutes from judicial review proliferate, the time has come for the Supreme Court to reject congressional tyranny and declare jurisdictional independence.

After an overview of the relevant constitutional provisions in Part I,²⁰ Part II of this Article recognizes the semantic space between the terms “judicial Power” and “jurisdiction” but denies that jurisdiction is thus vulnerable.²¹ Acknowledging the slipperiness of the word “shall,” Part III explains that regardless of whether it is read as a mandate or as a statement about the future, the word leaves no discretion for Congress to withhold constitutionally granted jurisdiction.²² Part IV rejects the premise that “extend[ed]” power is merely potential, subject to a legislative trigger; it argues instead that an extension of power is the functional equivalent of a grant of power.²³ The Article concludes by noting the widespread acceptance of the importance of judges’ jurisprudential independence in the constitutional design and urging similar recognition for the Supreme Court’s jurisdictional independence.²⁴

I. ONE FLAWED THEORY, TWO CLAUSES OF ARTICLE III

At the time delegates gathered in Philadelphia to write a Constitution, the United States had but a scintilla of a national court system. Under the Articles of Confederation, the Continental Congress had established the Court of Appeals in Prize Cases to exercise jurisdiction

clude”); cf. Meltzer, *supra* note 14, at 1573 n.14 (suggesting that even if “shall” is mandatory, the mandate is only that when the judicial power is exercised, “the exercise must be by article III courts”).

¹⁹ THOMAS PAINE, COMMON SENSE 54 (Edward Larkin ed., Broadview Editions 2004) (1776) (emphasis added).

²⁰ See *infra* notes 25–51 and accompanying text.

²¹ See *infra* notes 55–163 and accompanying text.

²² See *infra* notes 164–244 and accompanying text.

²³ See *infra* notes 245–399 and accompanying text.

²⁴ See *infra* notes 400–411 and accompanying text.

in cases of capture.²⁵ Congress was also authorized to appoint courts to try piracies and felonies committed on the high seas, but instead it had delegated such matters to state judges.²⁶ Land disputes between states, or between people claiming rights under the grants of different states, were resolved through a procedure superintended by Congress.²⁷ In the states, appellate reviews of trial judgments were often performed by legislative and executive officials, as well as judges.²⁸ In Great Britain, the nation Americans most often looked to as a model, the House of Lords acted, according to Sir William Blackstone, as “the supreme court of judicature.”²⁹ Federalists who gathered in Philadelphia envisioned a robust national judiciary as a crucial element of a stronger general government.³⁰

In Article III of the new Constitution, their vision took hold. It was particularly important for the Federalists to clarify that judicial power lay with courts rather than with a legislature.³¹ And they did. “The judicial Power of the United States” was to be vested not in any legislative or executive body but only in “one supreme Court” and, potentially, in

²⁵ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1; *see also* ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 13–15 (2d ed. 2002) (detailing the court’s origins and modest caseload).

²⁶ ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1; *see also* SURRENCY, *supra* note 25, at 11–12 (noting that such courts never materialized).

²⁷ *See* ARTICLES OF CONFEDERATION of 1781, art. IX, paras. 2–3 (setting out a precise procedure for resolving such disputes); SURRENCY, *supra* note 25, at 12 (noting that the procedure was rarely used).

²⁸ Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75, 105 (1995) (quoting WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 36 (Wythe Holt & L.H. LaRue eds., 1990)) (“The ultimate reviewing authority of judicial proceeding was not vested exclusively in the judiciary in any state.”).

²⁹ 3 WILLIAM BLACKSTONE, *COMMENTARIES* *56, *quoted in* Wells & Larson, *supra* note 28, at 103–04. At the Convention, James Madison referred to the House of Lords as “the supreme tribunal of Justice.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 130 (June 6), 139 (Madison’s notes) (Max Farrand ed., 1966) [hereinafter *RECORDS*]. In each citation of Farrand’s *Records*, to orient the reader, I have included the page number for the start of the day in question followed by the page number for the specifically relevant material, along with a parenthetical indication of the source. The most common sources are the official but somewhat sparse journal kept by the Convention’s secretary, William Jackson, and the thorough notes of Madison. When applicable, I have cited multiple sources within *Records*.

³⁰ *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1199 (1992) (noting the delegates’ focus on constraining “excessive legislative power”).

³¹ *See, e.g.*, 1 *RECORDS*, *supra* note 29, at 130 (June 6), 134–35 (Madison’s notes) (recording Madison’s comment that the need to establish a body to guard against the “inconveniences of democracy” by securing private rights and dispensing justice may have been the prime motivation for the Convention).

“inferior Courts.”³² That power would extend to nine categories of cases and controversies.³³ Congress would decide whether to establish inferior courts, a prerogative that might entail full control over their jurisdiction.³⁴ But legislative control over the jurisdiction of the Supreme Court would be limited to relatively minor details, such as timing rules for litigants or allowing the Court to hear certain cases as original matters rather than waiting for appeals.³⁵

Today, however, the picture drawn at the Federal Convention hangs upside down. The prevailing theory holds that the appellate jurisdiction of the Supreme Court is largely at the mercy of Congress.³⁶ Scholars disagree about the restraints, if any, on legislative control.³⁷

³² U.S. CONST. art. III, § 1.

³³ *Id.* art. III, § 2.

³⁴ *See id.* art. III, § 1. The extent of legislative control of the jurisdiction of inferior courts is beyond the scope of this Article. *See infra* note 142 (citing authority for the view that Congress's power with respect to the existence of inferior courts implies power over their jurisdiction).

³⁵ *See* Glashausser, *supra* note 4, at 1442–43 (discussing the permissible scope of legislative regulation of the Supreme Court's jurisdiction).

³⁶ *See* William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENT. 89, 94 (1990) (defending the theory of “plenary power”); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 908 (1984) (finding “compelling” reasons to conclude that “there are no substantial internal limits on Congress’ article III power to limit the Court’s appellate jurisdiction”); Harrison, *supra* note 17, at 206 (“The textual reading . . . according to which Article III grants Congress broad power over the Supreme Court’s appellate jurisdiction . . . has come to be referred to as the orthodox, or traditional, interpretation.”); Ralph A. Rossum, *Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause*, 24 WM. & MARY L. REV. 385, 423–24 (1983) (calling congressional power over the Court’s appellate jurisdiction “plenary” and dismissing contrary arguments); Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1894 (2008) (“Under the traditional view, . . . Congress has considerable—if not unlimited—power . . . to strip the Supreme Court of appellate jurisdiction.”); Velasco, *supra* note 14, at 763 (defending “the orthodox position that Congress possesses nearly plenary authority to regulate the jurisdiction of the federal courts”); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1005 (1965) (defending the position that “Congress has the power . . . to strike at what it deems judicial excess by delimitations . . . of the Supreme Court’s appellate jurisdiction” and finding “no basis” for limits on that power within Article III).

³⁷ Scholars acknowledge limits imposed by constitutional provisions beyond Article III. *See, e.g.,* Martin H. Redish, *Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 902–03, 918–23 (1982) (conceding the possibility that other constitutional provisions, such as the Equal Protection Clause, might in some circumstances restrain congressional power). Some stress that Congress may not deny litigants a federal forum for constitutional claims. *See, e.g.,* Lea Brilmayer & Stefan Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 VA. L. REV. 819, 821–22 (1983); Lawrence Gene Sager, *Constitutional Limitations on Congress’ Authority to*

But the basic premise of the judiciary's dependence on the legislature for jurisdiction has gone almost unchallenged.³⁸ In fact, the Court itself has been complicit in its own subservience.³⁹

No practical pathogen has caused this disorder. With apologies to Chief Justice John Marshall's famous overheated dictum about judicial obligation,⁴⁰ the power to exercise jurisdiction is not a duty to do so in every case. For most of the past century, the Supreme Court has largely controlled its own workload, hearing most "appellate" (in the constitutional sense) cases via the discretionary writ of certiorari rather than "appeals" per se.⁴¹ There is thus no basis for concern that allowing the

Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 67 (1981); Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 140-41 (1981) (arguing that legislative attempts to "manipulat[e] jurisdiction" to defeat enforcement of constitutional rights are generally impermissible). *But cf.* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (calling state courts "the primary guarantors of constitutional rights, and in many cases . . . the ultimate ones").

³⁸ Robert Clinton's theory holds that the cases and controversies listed in the Extension Clause must be within the jurisdiction of a federal court, but not necessarily the Supreme Court. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 751-53 (1984). Akhil Amar embraces mandatory federal jurisdiction for what the Extension Clause describes as "all Cases," but not for mere "Controversies." Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 238-41 (1985). Though it is tempting to ascribe significance, as Amar does, to the "all" that appears three times in the list of nine categories, a close look reveals its selective presence and absence to have no impact on Congress's authority to control federal jurisdiction. That analysis is beyond the scope of this Article.

For a more thorough overview of the scholarly literature about the propriety of jurisdiction-stripping, see Glashausser, *supra* note 4, at 1390-99.

³⁹ Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1561 (1986) ("Ironically, the federal judiciary itself created the jurisdictional insecurity that continues to plague it."); Jerome T. Levy, *Congressional Power over the Appellate Jurisdiction of the Supreme Court: A Reappraisal*, 22 INTRAMURAL L. REV. N.Y.U. 178, 183 (1967) ("[T]he governmental body most ready to assert the power of Congress to deprive the Court of its appellate jurisdiction has been the Court itself."); *see infra* notes 71-72 (citing cases in which the Supreme Court has acquiesced to congressional control of its jurisdiction).

⁴⁰ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.")

⁴¹ Since 1925, and even more so since 1988, most cases have arrived at the Supreme Court through the discretionary writ of certiorari. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 10.3.2, at 702-05 (6th ed. 2012) (tracing the history of the distinction between appeal and certiorari). Exercising its "judicial discretion," the Court grants that writ only for "compelling reasons." SUP. CT. R. 10. Even when hearing cases on appeal (as opposed to certiorari), the Court has on occasion declined to exercise its jurisdiction. *See, e.g., Zucht v. King*, 260 U.S. 174, 176 (1922) (citing a "duty to decline jurisdiction" when a question presented is not "substantial"). It also remains free to apply precedents about

full constitutional complement of appellate jurisdiction, including even cases of incomplete diversity,⁴² would overwhelm the Court.⁴³

The orthodox understanding of congressional control rests on two provisions in Section 2 of Article III of the Constitution, namely, the Extension Clause and the Exceptions Clause:

The *judicial Power shall extend* to [nine types of cases and controversies]. In [two types of cases], the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such *Exceptions*, and under such Regulations as the Congress shall make.⁴⁴

One of the standard arguments advanced by proponents of the conventional view is that the “Exceptions” permit Congress to strip appellate jurisdiction from the Supreme Court.⁴⁵ That interpretation may have superficial appeal, as well as the imprimatur of practice and prece-

justiciability and fashion doctrines of abstention for itself much like those invoked, with the Court’s approval, by inferior courts. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (holding that political gerrymandering claims are nonjusticiable); *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (holding that federal courts should abstain from cases in which a federal constitutional question could be avoided by a state court determination of the meaning of state law).

⁴² As it is, though permitted by 28 U.S.C. § 1254 (2006), the Supreme Court rarely chooses to hear cases whose only basis for federal jurisdiction is complete diversity. *See* Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 946 (1996) (noting that the Court “routinely” denies certiorari in such cases).

⁴³ The question of what types of substance-neutral jurisdictional regulation would be constitutionally appropriate is beyond the scope of this Article. *See* Glashausser, *supra* note 4, at 1441–43 (probing that issue).

⁴⁴ U.S. CONST. art. III, § 2 (emphasis added).

⁴⁵ *See, e.g.*, Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 1003 (2008) (“The Exceptions Clause is the broadest grant of congressional power in the original Constitution not found in Article I, and it gives Congress wide authority to alter and abolish federal court jurisdiction.”); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1087–89 (2010) (acknowledging broad power under the Exceptions Clause as long as inferior courts retain “ultimate authority . . . to declare and enforce federal law”); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 608–09, 612–13 (1992) (referring to the “venerable principle” that the Exceptions Clause grants Congress “substantial control” over the Supreme Court’s jurisdiction); Redish, *supra* note 37, at 901 (explaining the “common sense interpretation” that the Exceptions Clause offers “fairly broad authority to curb Supreme Court appellate jurisdiction”); *cf.* James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1435–36 (2000) (acknowledging “broad power” to make exceptions as long as the Supreme Court retains its “traditional powers of superintendence” of the inferior courts).

dent.⁴⁶ But as I have explained in detail in an earlier article, the Exceptions Clause, properly understood, allows Congress merely to shift cases from the Court's appellate jurisdiction to its original jurisdiction, so that the Court can hear the cases earlier—not, as most insist, to shield cases from its review altogether.⁴⁷ In short, the word “Exceptions” applies to the “appellate” form of the Court's jurisdiction, rather than to the existence of “Jurisdiction.” Though the bare text of the Exceptions Clause may be somewhat ambiguous and thus open to various potential interpretations,⁴⁸ its drafting history confirms that it was designed to expedite cases, not to eliminate them.⁴⁹ A thorough explication of the Exceptions Clause is beyond the scope of this Article, but this basic background may help illuminate the broader debate.

The orthodoxy's other constitutional argument—the one addressed here—relies on the Extension Clause. If my previous article about the Exceptions Clause substantially disarmed the orthodoxy, the current one about the Extension Clause aims to leave it defenseless, revealing the theory of congressional control to be wholly untenable. Absent an analysis of the Extension Clause, the propriety of stripping the Supreme Court of jurisdiction would still be debatable; even if one acknowledges that congressional “Exceptions” transform appellate jurisdiction into original jurisdiction rather than eliminating it, one could cling to the contention that Congress need not “extend” the full

⁴⁶ See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514–15 (1869) (citing the “express words” of the Exceptions Clause and dismissing an appeal for lack of jurisdiction on the ground that Congress had, during the pendency of the appeal, repealed the jurisdictional statutory provision relied on by a habeas corpus petitioner). One of the three recent bills described above—the We the People Act—cites the Exceptions Clause as its constitutional basis. H.R. 958, 112th Cong. § 2 (2011); see *supra* text accompanying note 6. The other two are silent on that issue. See H.R. 1096, 112th Cong. § 3(a) (2011); H.R. 875, 112th Cong. § 2(a) (2011); *supra* text accompanying notes 5–7.

⁴⁷ Glashausser, *supra* note 4, at 1401–02. Some other scholars have embraced this minority interpretation of the Exceptions Clause. See Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1006, 1013, 1037 (2007); Laurence Claus, *Constitutional Guarantees of the Judiciary: Jurisdiction, Tenure, and Beyond*, 54 AM. J. COMP. L. 459, 460 (2006) [hereinafter Claus, *Constitutional Guarantees*]; Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 78–79 (2007) [hereinafter Claus, *One Court*]. As a doctrinal matter, of course, Chief Justice Marshall's opinion in *Marbury v. Madison* rejected the notion that Congress could expand the Court's original jurisdiction. 5 U.S. (1 Cranch) 137, 174–75 (1803). The etiology of how the conventional view developed will be the subject of a future article.

⁴⁸ Glashausser, *supra* note 4, at 1400–02.

⁴⁹ *Id.* at 1403–34.

range of appellate jurisdiction in the first place.⁵⁰ If one recognizes, however, that the Extension Clause sets not just the ceiling but also the floor of the Court's jurisdiction, the conventional account loses its last leg to stand on.⁵¹

As sketched above, scholars seeking to prop up the orthodox interpretation have attacked the three terms at the front of the Extension Clause: "judicial Power," "shall," and "extend."⁵² Each of the three lines of attack purports to explain how it is that calibrating the scope of the Supreme Court's appellate jurisdiction rests with Congress, a body mentioned nowhere in the clause.⁵³ As discussed below in Parts II, III,

⁵⁰ Under such a reading, Congress could use its power under the Exceptions Clause to expand the set of cases whose form of jurisdiction would be original but could still set the overall level of the Court's jurisdiction below the putative ceiling of the Extension Clause. Perhaps Congress could withhold jurisdiction even over cases whose jurisdiction would, if it existed at all, be constitutionally settled as original. Though scholars advocating the conventional view have largely shied from that possibility, it is not structurally inconceivable. See Liebman & Ryan, *supra* note 14, at 755 (speculating that the Original Jurisdiction Clause "might leave the legislature with the power to decide whether to confer supreme court jurisdiction over those disputes, while embodying a strong presumption in favor of doing so and a requirement that any such jurisdiction be original").

⁵¹ If one were to acknowledge the Extension Clause's guarantee of jurisdiction but insist that the Exceptions Clause allows Congress to take it away, one would embrace an awkward, if not wholly unimaginable, posture in which one constitutional provision is an unqualified grant to the judiciary but another is a legislative license to undo that grant. See 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 616 (1953) (criticizing the view that the exceptions power is "unconditioned by the earlier absolute provisions of Article III"); Amar, *supra* note 38, at 241 n.120 (opining that such an interpretation "should not be lightly indulged if an alternative reading is possible"); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 U. PA. L. REV. 1651, 1654 (1990) (calling such an interpretation "awkward"); cf. Calabresi & Rhodes, *supra* note 30, at 1163 (observing that advocates of mandatory jurisdiction maintain that for the jurisdiction-stripping power to be textually explicit, either the Vesting Clause or the Extension Clause would need to refer to the superseding power of the Exceptions Clause). But see Martin H. Redish, *Text, Structure, and Common Sense in the Interpretation of Article III*, 138 U. PA. L. REV. 1633, 1635–36 (1990) (arguing that regardless of the meaning of other provisions of Article III, the Exceptions Clause unambiguously empowers the legislature to restrict jurisdiction); Velasco, *supra* note 14, at 712 n.196 (arguing as a backup that "[r]egardless of whether the judicial power and jurisdiction refer to two different concepts or are synonymous, the Exceptions Clause is not limited by, but rather controls, the words 'shall extend'"). As one scholar recently put it, such "constitutional tension" suggests that "Article III is at war with itself." Grove, *Structural Safeguards*, *supra* note 4, at 870–73 (arguing that the tension is resolved by "structural safeguards" of Article I that save Article III from itself).

⁵² See *supra* notes 13–19 and accompanying text.

⁵³ See *supra* note 44 and accompanying text.

and IV, each of the three is flawed.⁵⁴ And thus so is the theory of the Court's jurisdictional dependency.

II. THE JURISDICTIONAL PAST (AND PRESENT) OF THE "JUDICIAL POWER"

To justify the stripping of the U.S. Supreme Court's appellate jurisdiction, some scholars have emphasized that the subject of the Extension Clause is the "judicial Power," not "jurisdiction."⁵⁵ As this Part explains, however, that shallow distinction overlooks the deeper interdependence of the two concepts. The constitutional drafting history sheds bright light on their relationship, in that for most of the Federal Convention, the subject of the clause was in fact "jurisdiction."⁵⁶ The late edit to "judicial Power" had nothing to do with facilitating legislative control of the Court's jurisdiction. The power was to be resolutely judicial and would inherently retain a jurisdictional dimension.

A. *A Judicial—Not Legislative—Power*

The most salient characteristic of the "judicial Power" may be the most obvious: it is judicial. Such truisms can smack of facile tautological sophistry. For example, when Chief Justice John Roberts announced that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,"⁵⁷ he was subtly equating invidious majoritarianism with affirmative action.⁵⁸ And Yogi Berra's dictum that "[i]t ain't over 'til it's over"⁵⁹ conflates the plausible and the possible.⁶⁰ But sometimes a judicial power is just judicial.

In a different context, the Supreme Court recently expanded on that fundamental tenet of Article III: "[T]he 'judicial Power of the United States' . . . can no more be shared' with another branch than 'the Chief Executive, for example, can share with the Judiciary the veto

⁵⁴ See *infra* notes 55–163 and accompanying text (discussing the term "judicial power"); *infra* notes 164–244 and accompanying text (discussing the term "shall"); *infra* notes 245–399 and accompanying text (discussing the term "extend").

⁵⁵ See *infra* notes 110–124 and accompanying text.

⁵⁶ See *infra* notes 130–163 and accompanying text.

⁵⁷ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

⁵⁸ See *id.* at 709–11 (holding that a school assignment plan designed to achieve racial balance violated the Equal Protection Clause).

⁵⁹ PHIL PEPE, *THE WIT AND WISDOM OF YOGI BERRA*, at xii (2002).

⁶⁰ That conflation, of course, flagrantly contravenes the "*Twigbal*" pleading standard. See *Ashcroft v. Iqbal*, 556 U.S. 662, 680, 683 (2009) (highlighting the importance of a line between "plausible" and "conceivable"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (same).

power, or the Congress share with the Judiciary the power to override a Presidential veto.’”⁶¹ In other words, the Article III power is not just primarily judicial, but solely judicial.

The context for that pronouncement was the 2011 case of *Stern v. Marshall*, in which the Court held that a federal statute authorizing bankruptcy courts to adjudicate state-law tort counterclaims in bankruptcy proceedings violated the U.S. Constitution by vesting the judicial power in courts whose judges lack the protections of Article III.⁶² Undergirding the holding was the principle of separation of powers: “Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III.”⁶³ From that premise, the Court reasoned that “in general, Congress may not ‘withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’”⁶⁴

One might think that a Court with such an emphatic view of the judiciary’s independence would likewise frown on legislatively withdrawing from federal courts’ cognizance cases and controversies that are listed in the Extension Clause. To be sure, a particular concern about congressional aggrandizement—seizing power from another branch for itself—may have animated *Stern*.⁶⁵ When confronting separation-of-powers issues, the Court has often viewed such power grabs with special skepticism.⁶⁶ But stripping the Court of jurisdiction ap-

⁶¹ *Stern v. Marshall*, 131 S. Ct. 2594, 2608 (2011) (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974) (quoting U.S. CONST. art. III, § 1)) (omission in original).

⁶² *Id.* at 2600–01, 2620.

⁶³ *Id.* at 2609.

⁶⁴ *Id.* (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)).

⁶⁵ *See id.* at 2624 (Breyer, J., dissenting) (framing an inquiry about whether Congress sought to aggrandize its own authority).

⁶⁶ *See, e.g., Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (“To forestall the danger of encroachment ‘beyond the legislative sphere,’ the Constitution imposes two basic and related constraints on the Congress. It may not ‘invest itself or its Members with either executive power or judicial power.’” (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928))); *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (holding a congressional attempt to assume executive power to be unconstitutional); *INS v. Chadha*, 462 U.S. 919, 959–62 (1983) (Powell, J., concurring) (detailing, in the context of a decision overturning a provision authorizing the legislative veto of an executive determination, the constitutional framers’ concern about the legislative exercise of judicial power); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the

proaches aggrandizement in substance, even though it may not be formally equal to legislative assumption of that power. By selectively eliminating judicial review, Congress in effect performs its own review of its enactments, implicitly concluding that they are constitutional.

In any event, if, as the *Stern* majority proclaimed, Congress may not even dilute the judicial power by conferring it in original form on non-Article III entities—despite the possibility of appeal to Article III courts—on the ground that “[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely,”⁶⁷ then it might seem to follow that Congress could hardly strip away the power to decide certain disputes from the Article III judiciary altogether. But in the midst of exalting Article III’s Section 1 (vesting the judicial power in federal courts), the majority’s opinion subtly nodded to the conventional view of jurisdiction-stripping that eviscerates Section 2: “When a suit is made of ‘the stuff of the traditional actions at common law . . . ,’ and is *brought* within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts.”⁶⁸

Who is it that needs to bring the suit within those bounds? An innocuous answer might be “the plaintiff,” but if so, the word “brought” would seem unnecessary. The more likely implicit answer is the conventional one, namely, that federal courts—including the Supreme Court—have no jurisdiction unless *Congress* affirmatively brings cases and controversies to them by enacting jurisdictional statutes within the bounds of the Extension Clause. As to inferior courts, that view may have merit, based on Congress’s discretion about the courts’ existence,⁶⁹ but that understanding is the norm even as to the Supreme Court. Perhaps the

other.”). See generally Walter Dellinger, *The Constitutional Separation of Powers Between the President and Congress*, 63 LAW & CONTEMP. PROBS. 513, 521–26 (2000) (summarizing the history and application of the “anti-aggrandizement principle”).

⁶⁷ *Stern*, 131 S. Ct. at 2620 (stressing that even seemingly “innocuous” intrusions on the judicial power unconstitutionally “compromise the integrity of the system of separated powers”).

⁶⁸ *Id.* at 2609 (emphasis added) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment)).

⁶⁹ See, e.g., *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850) (upholding Congress’s right to define inferior courts’ jurisdiction “as a necessary consequence” of its power to establish such courts); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 46–47 (1975) (restating the traditional argument that the power to disestablish courts necessarily includes the power to limit their jurisdiction); cf. LARRY W. YACKLE, *FEDERAL COURTS* 60–61 (1999) (agreeing with the Supreme Court’s decision in *Sheldon* but criticizing the Court’s reliance on the “‘greater power’ syllogism”).

Stern majority used the passive voice because the standard view is so commonplace as to be understood even when not spelled out. Or perhaps next to *Stern's* ringing language about the separation of powers, it would have been embarrassing to emphasize that the responsibility for adjudicating the suits listed in the Extension Clause resides with the Article III judiciary only to the extent that Congress sees fit to allow.

Regardless of what signal the *Stern* majority meant to send, there is little reason to think that the Supreme Court is ready to embrace the view that its own jurisdiction is constitutionally enshrined. In 1799, the Court announced that “[i]f congress has given the power to this Court, we pos[s]ess it, not otherwise”⁷⁰ And after similar pronouncements through the years,⁷¹ the same principle held true in 1996: “[O]ur appellate powers . . . ‘are limited [by Congress].’”⁷²

More recently, in 2006, a majority of the Supreme Court in *Hamdan v. Rumsfeld* managed to avoid exploring “Congress’ authority to impinge upon [its] appellate jurisdiction” on the ground that the jurisdiction-stripping statute in question—the Detainee Treatment Act of 2005⁷³—did not apply to the case at hand.⁷⁴ Though five justices referred to “grave questions” about that putative legislative authority, those questions apparently focused on the narrow issue of the constitutionality of withdrawing jurisdiction to hear habeas corpus petitions.⁷⁵ Indeed, two years later, those same five justices held for the Court that the statute violated Article I’s Suspension Clause and thus had no occasion to address the broader impingement question.⁷⁶ Three justices, all

⁷⁰ *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 10 n.1 (1799).

⁷¹ *E.g.*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 567 (1962) (noting with approval that “Congress has consistently with [Article III] withdrawn the jurisdiction of this Court to proceed with a case then *sub judice*”); *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 507–08, 514–15 (1869) (dismissing an appeal for lack of jurisdiction on the ground that Congress had, during the pendency of the appeal, repealed a jurisdictional statutory provision relied on by the habeas corpus petitioner); *Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1866) (“In order to create [appellate] jurisdiction in any case, . . . an act of Congress must supply the requisite authority.”); *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847) (“[T]he Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress”).

⁷² *Felker v. Turpin*, 518 U.S. 651, 661 (1996) (quoting *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810)).

⁷³ Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (codified at 28 U.S.C. § 2241(e)(1) (2006)); see *supra* text accompanying notes 9–10 (discussing the statute).

⁷⁴ 548 U.S. 557, 574–76 (2006).

⁷⁵ See *id.* at 566, 575, 638.

⁷⁶ See *Boumediene v. Bush*, 553 U.S. 723, 730, 732–33 (2008). Although the Supreme Court did not directly address that more general issue in striking down the Detainee Treatment Act, some scholars have seen broader implications in the decision. See PFANDER, *supra*

of whom were in the *Stern* majority,⁷⁷ dissented in *Hamdan* and directly rejected the argument that Congress could not control the Court's appellate jurisdiction.⁷⁸

Still, a Court willing to embrace *Stern's* robust view of the judicial power and the impermissibility of spreading it to non-Article III entities should be able to acknowledge the independence of that same power from legislative restriction. If (un)constitutionality has a continuum, stripping the Supreme Court of jurisdiction is more egregious—regardless of the putative distinction about whether or not the legislative branch formally acquires any power⁷⁹—than allowing bankruptcy courts to adjudicate common law claims. Under the statutory scheme invalidated by *Stern*, Article III courts retained appellate jurisdiction to review bankruptcy court judgments on such claims;⁸⁰ the harm was thus temporary and ultimately curable,⁸¹ as with an unwarranted requirement to exhaust state remedies before pursuing an action under 42 U.S.C. § 1983 in federal court.⁸² In contrast, if Congress has withdrawn jurisdiction over the type of case or controversy at issue, no Article III court will weigh in during the life of the litigation; such harm can be permanent and dispositive, as with the unconstitutional nullification of the writ of habeas corpus.⁸³ The maxim notwithstanding, justice denied can be worse than justice delayed.

Indeed, legislative restraints on federal jurisdiction undermine both purposes *Stern* cited for the separation of powers. One is “to pro-

note 8, at 161–62 (suggesting that the Court's non-dogmatic analysis “would presumably inform the Court's evaluation of [other] jurisdiction-stripping legislation”); Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMMENT. 377, 395 (2009) (arguing that the majority implicitly decided that, in constitutional cases, Congress may not preclude all federal jurisdiction).

⁷⁷ *Stern*, 131 S. Ct. at 2599 (Roberts, C.J., joined by Scalia, Kennedy, Thomas & Alito, JJ.).

⁷⁸ *Hamdan*, 548 U.S. at 672 (Scalia, J., dissenting, joined by Thomas & Alito, JJ.). The *Hamdan* dissenters cited the Exceptions Clause in support. *See id.* But most statements by the Court about its jurisdictional subjugation do not specify any constitutional text. *See, e.g., Barry*, 46 U.S. (5 How.) at 119 (citing only “the constitution of the United States”).

⁷⁹ *See supra* notes 65–66 and accompanying text (discussing the anti-aggrandizement principle).

⁸⁰ *Stern*, 131 S. Ct. at 2603–04, 2618–19.

⁸¹ *But cf. id.* at 2611 (noting the “limited” nature of appellate review, in that Article III courts would defer to the findings of fact of bankruptcy courts).

⁸² *See Monroe v. Pape*, 365 U.S. 167, 168, 183 (1961) (holding that plaintiffs need not exhaust state remedies before invoking § 1983 to obtain jurisdiction in federal court); *see also* 42 U.S.C. § 1983 (2006) (providing any person deprived of rights under color of state law with a private right of action in federal court).

⁸³ *See Boumediene*, 553 U.S. at 732–33 (holding that suspension of the writ of habeas corpus by the Military Commissions Act of 2006 was unconstitutional because substitute procedures provided by the Detainee Treatment Act of 2005 were inadequate).

tect each branch of government from incursion by the others.”⁸⁴ The putative authority of Congress to prevent the judiciary from doing its job—which often happens to include reviewing the constitutionality of congressional acts—invites such an incursion. The other is to “protect the individual.”⁸⁵ On that note, a central purpose of the federal judiciary is to safeguard federal rights and interests that might not receive proper respect in state courts.⁸⁶ In *Stern*, the Supreme Court protected litigants from having to start in a non-Article III court; one hopes the Court will one day recognize that the conventional view of congressional power raises the federalism concern that litigants may be (unconstitutionally) stopped from ever reaching any federal forum at all.

That day does not seem to be at hand, however. The Supreme Court continued its complicity in the conventional view in the 2012 case of *Mims v. Arrow Financial Services, LLC*.⁸⁷ The case turned in part on whether a specific jurisdictional statute trumped the general federal question jurisdictional provision of 28 U.S.C. § 1331.⁸⁸ Writing for a unanimous Court, Justice Ruth Bader Ginsburg noted that federal “jurisdiction” exists over any claim arising under federal law, with a crucial caveat: “unless Congress divests federal courts of their § 1331 *adjudicatory authority*.”⁸⁹

Section 1331, of course, would be substantively superfluous absent the conventional view that Congress may divest federal courts of their Article III *judicial power*. Justice Ginsburg thus implicitly acquiesced to that view, but by resorting to lexical camouflage, she hid from its glare. For what is “adjudicatory authority” but “judicial Power”? And if the “judicial Power” of the United States “shall extend” constitutionally to “all Cases . . . arising under . . . the Laws of the United States,” how can Congress divest that power? One might argue that Congress’s discretion about whether to establish inferior courts in the first place implies discretion to control their jurisdiction, a point that lies beyond the scope of this Article.⁹⁰ But as to the Supreme Court, it is harder to explain the supposed fragility of the “judicial Power.” The awkwardness of

⁸⁴ *Stern*, 131 S. Ct. at 2609 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011)).

⁸⁵ *Id.*; see also *id.* at 2615 (calling Article III a “guardian of individual liberty”).

⁸⁶ See, e.g., YACKLE, *supra* note 69, at 29 (noting the subtle distinction between federal law and federal interests).

⁸⁷ 132 S. Ct. 740, 744–45 (2012).

⁸⁸ *Id.* at 753.

⁸⁹ *Id.* at 749 (emphasis added).

⁹⁰ See *supra* note 69 and accompanying text (citing authorities asserting legislative power to control the jurisdiction of inferior courts).

evoking Article III's language presumably drove Justice Ginsburg to seek refuge in the Orwellian "adjudicatory authority."

Whatever her reasons for choosing that phrase, Justice Ginsburg's opinion in *Mims* equated "adjudicatory authority" with "jurisdiction," in effect acknowledging the common-sense notion that if courts have "adjudicatory authority"—or in plainer language, judicial power—then they have jurisdiction.

B. *The Interdependence of Jurisdiction and the Judicial Power*

The constitutionally granted "judicial Power" is not interchangeable with "jurisdiction," but neither is it unrelated.⁹¹ It is simply more expansive.⁹² The argument that the distinction between those terms permits legislative control of the Supreme Court's appellate "jurisdiction" is thus unfounded.

1. The Fluidity of the Terms

As many have recognized, jurisdiction—the power to "hear and determine" disputes, as the Supreme Court has called it⁹³—is but a specific dimension of judicial power,⁹⁴ serving as a threshold or gateway to the power's other facets.⁹⁵ A court's general judicial power also in-

⁹¹ See A. Michael Froomkin, *Still Naked After All These Words*, 88 NW. U. L. REV. 1420, 1421–23 (1994) (calling the terms "not inevitably synonymous" and discussing their interrelationship).

⁹² See Amar, *supra* note 38, at 231 n.88 (referring to the judicial power as including jurisdiction); Leland E. Beck, *Constitution, Congress, and Court: On the Theory, Law, and Politics of Appellate Jurisdiction of the United States Supreme Court*, 9 HASTINGS CONST. L.Q. 773, 783 n.32 (1982) (noting that the term "encompasses not only the authority to hear and determine cases," but also powers inherent to courts).

⁹³ *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 709 (1832) ("The power to hear and determine a cause is jurisdiction . . ."); see also *infra* text accompanying notes 333–378 (discussing the history of the phrase "hear and determine").

⁹⁴ See David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 BYU L. REV. 75, 82–83 (referring to jurisdiction as one "dimension" of judicial power, distinguishable from the dimension of "judicial potency" with respect to cases within a court's jurisdiction); cf. WILLIAM A. SUTHERLAND, NOTES ON THE CONSTITUTION OF THE UNITED STATES 518 (1904) ("Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to a suit; to adjudicate or exercise judicial power over it."); Velasco, *supra* note 14, at 711 ("[T]he judicial power is the general power of the judiciary while jurisdiction is the authority to exercise that power in a given case.").

⁹⁵ See CHARLES WARREN, CONGRESS, CONSTITUTION, AND THE SUPREME COURT 55 (1930) ("Judicial power comprises the functions exercised by a Court *after* it has obtained jurisdiction."); Froomkin, *supra* note 91, at 1422 n.10 (calling jurisdiction a "prerequisite to the exercise of judicial power").

cludes, for example, the specific powers to issue judgments,⁹⁶ to wield certain remedies,⁹⁷ and to control the attorneys before it,⁹⁸ as well as other “inherent” powers.⁹⁹

The argument that jurisdiction is not inherently part of the “judicial Power” of the Extension Clause would have more force if the clause read something like this: “The judicial Power shall extend to the full range of remedies available at common law.”¹⁰⁰ Because the actual text, however, extends the judicial power not to certain remedies but to certain categories of legal disputes, the inference is reasonably clear that the clause addresses the jurisdictional dimension of the power—in other words, the set of disputes that the courts, vested with the power by Section 1 of Article III, are able to hear and determine.

The word “jurisdiction” itself is hardly static. It can signify not only the ability to hear and determine a case but also the subject matter of a case; that meaning is apparent in the Extension Clause’s category of

⁹⁶ See SAMUEL MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 314 (New York, Banks & Bros. 1891) (defining judicial power as that “of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision”).

⁹⁷ See *Michaelson v. United States*, 266 U.S. 42, 70–71 (1924) (citing “inherent judicial power” as the source of authority to hold parties in contempt). Despite *Marbury v. Madison*’s insistence on treating a writ of mandamus as a type of jurisdiction, see 5 U.S. (1 Cranch) 137, 175–76 (1803), it may be better viewed as a separate aspect of judicial power—an understanding under which the decision was wrongly decided. After all, the Judiciary Act of 1789 set out “jurisdiction” over various cases while granting the Supreme Court the “power” to issue certain writs, order parties to produce evidence, and grant new trials. Judiciary Act of 1789, ch. 20, §§ 13, 14, 15, 1 Stat. 73, 80–83 (codified as amended at 28 U.S.C. § 1652 (2006)); see Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 456–59 (1989) (parsing the usage of “jurisdiction” and “power” in the Judiciary Act of 1789).

⁹⁸ Judiciary Act of 1789, ch. 20, § 17 (authorizing the power to punish contempt and to “establish all necessary rules for the orderly conducting [of] business”). The Supreme Court has often referred to the ability to control attorneys as part of the judicial power. E.g., *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378–79 (1867) (discussing the power to admit and disbar attorneys).

⁹⁹ See EDWARD F. COOKE, A DETAILED ANALYSIS OF THE CONSTITUTION 94 (6th ed. 1995) (describing “judicial power” as “the power of a court to hear and pronounce a judgment and carry that judgment into effect,” in contrast to “jurisdiction,” which is “the authority of a court to exercise judicial power in a specific case”); WARREN, *supra* note 95, at 56 (describing judicial power as the power “to enter judgment, to issue execution, to enjoin, to commit for contempt, or to do any of the other things which the Court performs as a judicial body”).

¹⁰⁰ In the absence of any constitutional language about jurisdiction, some observers might have argued that Congress had full control; others that there must be implicit limits to avoid encroaching on states; and others that jurisdiction would continue as before, in the small range of prize cases heard by national courts under the Articles of Confederation. See *supra* note 25 and accompanying text.

"all Cases of admiralty and maritime Jurisdiction." Indeed, it would have been odd to describe courts as having "jurisdiction" over cases of a certain "jurisdiction."

The term can also refer to general governmental authority or sovereignty.¹⁰¹ And it can mean geographic territory. Confusion among those senses resulted in the Article IV prohibition of the creation of new states "within the Jurisdiction of any other State."¹⁰² Some states had asserted claims to western territory beyond their borders, and delegates to the Federal Convention specifically substituted "Jurisdiction" for "limits" to allay a concern that one state might be "within the asserted limits" of another yet beyond its authoritative "Jurisdiction."¹⁰³

As Article III took shape at the Convention, the versatility of "jurisdiction" was all too evident in the Extension Clause. For most of the summer, the operative draft of the clause used it in three ways: "The *Jurisdiction* of the Supreme Court shall extend to . . . all cases of Admiralty and maritime *jurisdiction*; [and] to controversies between two or more States, (except such as shall regard Territory or *Jurisdiction*) . . ."¹⁰⁴ In the face of such looming inelegance, it is no surprise that, in late August, the phrase "judicial Power" intervened as the subject of the clause or that the word "jurisdiction" was reserved to allocate cases between original hearings and appeals.¹⁰⁵

"Jurisdiction" was the natural word to use with "original" and "appellate." It would have been unthinkable clumsy to refer to a court's original or appellate "judicial power." And the choice of "judicial Power" as the Extension Clause's subject linked Section 2 of Article III to the previous section, which vested that power in the Supreme Court (and potentially in inferior courts); the Vesting Clause in turn echoed the introductions of the legislative and executive powers in the openings of Articles I and II.¹⁰⁶ Since the first days of the Convention, dele-

¹⁰¹ For example, at the Federal Convention, Connecticut's Roger Sherman opposed a resolution requiring oaths by state officials about observing national laws as "unnecessarily intruding into the State jurisdictions." 1 RECORDS, *supra* note 29, at 192 (June 11), 203 (Madison's notes).

¹⁰² See U.S. CONST. art. IV, § 3. James Wilson, writing not as a constitutional drafter but as a Supreme Court justice, asserted the Court's constitutionally granted power over states in terms that, in context, he treated as interchangeable: "jurisdiction," "judicial power," and "judiciary authority." See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793) (Wilson, J.).

¹⁰³ 2 RECORDS, *supra* note 29, at 457 (Aug. 30), 463 (Madison's notes).

¹⁰⁴ See *id.* at 176 (Aug. 6), 186 (report of the Committee of Detail) (emphasis added).

¹⁰⁵ *Id.* at 422 (Aug. 27), 425 (journal), 431 (Madison's notes).

¹⁰⁶ The Vesting Clause addresses the judicial power "of the United States." U.S. CONST. art. III, § 1. Some scholars have seized on that qualifier to distinguish the judicial power from the unadorned "executive Power" vested by Article II. See, e.g., Calabresi & Rhodes,

gates had referred to the three coordinate “powers”¹⁰⁷—the same ones King George III had lambasted colonists for using¹⁰⁸—and a midsummer draft of the Constitution had stated that “[t]he Government shall consist of supreme legislative, executive, and judicial Powers.”¹⁰⁹ Keeping “jurisdiction” at the head of the Extension Clause would have neither sufficed stylistically nor communicated the full range of authority granted to the national courts.

2. A False Dichotomy

The expansiveness of “judicial Power” and protean nature of “jurisdiction” are hardly reasons to doubt the Extension Clause’s role as a jurisdictional grant to the Supreme Court. But defenders of the orthodoxy have seized on the distinction between them to argue that even if the “judicial Power” shall extend over the listed cases, Congress retains control over “jurisdiction.”¹¹⁰ Julian Velasco’s position is illustrative. He

supra note 30, at 1196. The distinction, they insinuate, makes the power granted in Article III’s Vesting Clause more susceptible to congressional control than that granted in its Article II counterpart. *See id.* (hinting that “of the United States” limits the judicial power). As a critic has pointed out, the distinction is of little import unless the President is purported to have executive power beyond that “of the United States.” *See* Froomkin, *supra* note 91, at 1425 n.22 (faulting the “over-literal mindedness” of the distinction); *cf. infra* note 278 (discussing the impact of the phrase “herein granted” in the Vesting Clause of Article I). Moreover, the phrase “of the United States” helps signal that individual states retain judicial power. At any rate, the judicial power referred to in the Extension Clause unmistakably refers to that of the Vesting Clause, namely, that “of the United States.” And the presence (in the Article III Vesting Clause) or absence (in the Extension Clause and in the Vesting Clauses of Articles I and II) of the clarifying qualifier hardly diminishes the elegance of the Extension Clause’s evocation of the parallel powers of other branches.

¹⁰⁷ The “Virginia Plan,” introduced by Governor Edmund Randolph, resolved that “the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.” 1 RECORDS, *supra* note 29, at 15 (May 29), 22 (Madison’s notes). Though that reference was to state governments, it was clear that the delegates viewed those three “powers” as the pillars of the new national government. *See, e.g.,* 1 RECORDS, *supra* note 29, at 62 (June 1), 67 (Madison’s notes) (summarizing the debate about the need to define executive “powers” as distinct from legislative and judiciary “powers”); *id.* at 130 (June 6), 139 (Madison’s notes), 141 (Robert Yates’s notes) (referring to “the Executive,” “the Judiciary,” and “the Legislature” as “distinct powers”); *id.* at 460 (June 29), 469 (Madison’s notes) (summarizing the exhortation by Connecticut’s Oliver Ellsworth to “[l]et a strong Executive, a Judiciary & Legislative power be created”).

¹⁰⁸ *See supra* text accompanying note 1.

¹⁰⁹ 2 RECORDS, *supra* note 29, at 163 (Wilson draft for the Committee of Detail).

¹¹⁰ *E.g.,* Liebman & Ryan, *supra* note 14, at 708, 751–52 (noting “confidently” the drafters’ distinction between terms and concluding that “the ‘Judicial Power shall extend to’ language could not mean ‘jurisdiction shall be’”); Meltzer, *supra* note 14, at 1573–74 n.14 (citing with approval a comment from a representative in the First Congress that “the failure to give the federal courts jurisdiction does not divest them of the judicial power”);

sees no inconsistency in arguing that “the Constitution explicitly grants Congress control over the Supreme Court’s appellate jurisdiction” (under the conventional interpretation of the Exceptions Clause) but acknowledging that “Congress has no control over the judicial power.”¹¹¹ After all, he rationalizes, “it is only the judicial power, not jurisdiction, that ‘shall extend’ to the enumerated cases.”¹¹²

It is one thing to note that the concepts are not identical but another to suggest that they do not even overlap. Jurisdiction, after all, is a prerequisite to the exercise of other facets of the judicial power.¹¹³ Velasco apparently could envision a judiciary with plenty of abstract power but no actual jurisdiction.¹¹⁴ As a theoretical construct, that could work, but as a constitutional foundation, it has no basis.¹¹⁵ Elsewhere, even Velasco seems to admit that jurisdiction is a dimension of the judicial power. In analyzing a rejected proposal at the Federal Convention for “the Judicial power [to] be exercised in such manner as the Legislature shall direct,”¹¹⁶ he posits that the proposal would have given Congress “plenary authority not only over *jurisdiction*, but over the *judicial power*.”¹¹⁷ Once those two terms are understood to be interdependent, it becomes hard to explain how one can be “irrevocably vested” (as Velasco admits) in the judiciary while the other is (as he posits) subject to “nearly plenary” congressional control.¹¹⁸

Velasco, *supra* note 14, at 705 n.167 (“At most, the judicial power automatically extends to all such cases. *Jurisdiction* does not.”).

¹¹¹ See Velasco, *supra* note 14, at 711 (noting that the judicial power is “irrevocably vested”). He later hedges that bet: “Regardless of whether the judicial power and jurisdiction refer to two different concepts or are synonymous, the Exceptions Clause is not limited by, but rather controls, the words ‘shall extend.’” *Id.* at 712 n.196.

¹¹² *Id.* at 711, 716.

¹¹³ See *supra* notes 94–95 and accompanying text.

¹¹⁴ See Velasco, *supra* note 14, at 711, 716.

¹¹⁵ See Froomkin, *supra* note 91, at 1423 (“[W]ithout jurisdiction a court has no ‘judicial Power.’”).

¹¹⁶ 2 RECORDS, *supra* note 29, at 431 (Max Farrand ed., 1911).

¹¹⁷ Velasco, *supra* note 14, at 732–33.

¹¹⁸ See *id.* at 711, 765 (acknowledging the permanency of judicial power and embracing the traditional view of congressional control of jurisdiction). Even under President Franklin Roosevelt, who famously tried to control the Supreme Court in various ways, the U.S. Department of Justice recognized the interdependence of jurisdiction and judicial power. In a memorandum evaluating a jurisdiction-stripping proposal, an assistant solicitor general opined that although Congress could restrict the Court’s “jurisdiction,” its “judicial power” was “exempt from legislative interference,” and thus the Court’s judicial review function could not be taken away under the guise of jurisdictional regulation. Memorandum from Warner W. Gardner, U.S. Dep’t of Justice, Washington, D.C., to the Solicitor Gen. (Aug. 15, 1935) (emphasis added), *quoted in* Grove, *Article II Safeguards*, *supra* note 4, at 272 & nn.101–05.

Another scholar, John Harrison, takes a superficially more tenable approach. He acknowledges the relationship between the terms: “Judicial power and jurisdiction are obviously closely related concepts, but, just as obviously, they are not the same concept.”¹¹⁹ The distinction he makes between them, however, is curious: “The judicial power is . . . less specific than a particular court’s jurisdiction, as the potential is less specific than the actual.”¹²⁰ He concludes that inapt juxtaposition by equating the judicial power with the “potential” as opposed to “actual scope of federal jurisdiction.”¹²¹ Harrison is right that “judicial power” is less specific than “jurisdiction.” But generality is not tantamount to potentiality. Nothing about its higher level of abstraction makes the judicial power “potential,” any more than the executive power is more potential than, say, the treaty power. Whether concerning treaties, the executive branch generally, or the judiciary, the constitutional power is actual; the potential is whether it will be used, and to what extent.

Harrison’s point about potentiality would be harmless if he meant that the entity with the power—the judiciary—could decide when to use it. Instead, though, he insists that the decision to unleash the judicial power is “left for Congress, as many important choices are.”¹²² To support that claim, in addition to relying on the conventional view of the Exceptions Clause, he compares Article III with Article I. The legislative *power* to “lay and collect Taxes” and so on does not imply a *duty* to do so. Harrison’s argument is that likewise, the *power* of the judiciary over a range of cases does not imply that it must have jurisdiction.¹²³ The analogy works to a point, but the more logical conclusion to draw from it would be that the judiciary is under no *duty* to exercise its power.¹²⁴

In the context of Article II, it would be unthinkable to interpret “the executive Power shall be vested” or “he shall have Power to grant Reprieves and Pardons” as having an implied qualifier of “only if Congress decides that the President may use the power.”¹²⁵ Yet the conven-

¹¹⁹ Harrison, *supra* note 17, at 214.

¹²⁰ *Id.* at 215.

¹²¹ *Id.* at 218.

¹²² *Id.* at 213.

¹²³ *Id.* at 213–14.

¹²⁴ See *supra* text accompanying notes 40–43 (stressing the Supreme Court’s lack of obligation to exercise its power in every case).

¹²⁵ See U.S. CONST. art. II, §§ 1–2; *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–48 (1872) (holding that Congress may not impair the executive pardon power); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 329–30 (1816) (analogizing that because the phrase “shall be vested” creates inviolable powers in Articles I and II, it does in Article III as well); cf. Amar, *supra* note 38, at 224 (drawing a similar parallel between judicial power and executive power).

tional view of the Extension Clause reduces the Supreme Court, with respect to its appellate jurisdiction, to such a puppet. Few commentators argue that the provision of Article III's Section 1 that "[t]he judicial Power of the United States, shall be vested in one supreme Court" allows Congress to interfere,¹²⁶ and with good reason. The drafters knew how to convey such authority, as they did in the same clause with respect to the potential establishment of inferior courts.¹²⁷ In Section 2, though, the conventional interpretation of "[t]he judicial Power" twists it into, effectively, "the legislative Power to authorize courts to exercise jurisdiction." Whatever ambiguities inhere in the concept of judicial power, a natural reading cannot shift the power, without any reference to Congress, from the judiciary to the legislature.

C. Words Collide in Philadelphia

The words that became the Extension Clause developed in fits and starts, but most of the editing concerned the substantive list of cases and controversies that would be heard and determined by the Supreme Court. The structure of the clause, in contrast, was relatively stable. As discussed in this Section, its subject at first was "jurisdiction" but eventually changed to "judicial Power," for reasons unrelated to legislative control of the Court's jurisdiction.¹²⁸ The equally innocuous appearance of the word "extend" is discussed in a later section.¹²⁹

1. The Early Focus on "Jurisdiction"

For most of the Federal Convention in Philadelphia during the summer of 1787, the nascent Extension Clause was phrased in terms of "jurisdiction." The clause originated in the "Virginia Plan" introduced by Governor Edmund Randolph on May 29, at the outset of the Convention.¹³⁰ The plan chartered a bold course for a radically new na-

¹²⁶ *But cf.* Calabresi & Rhodes, *supra* note 30, at 1178, 1187–88, 1199–1200, 1209–10 (positing that if "shall" means "will," the clause is merely "descriptive" rather than "mandatory" and thus allows Congress discretion).

¹²⁷ *See infra* notes 330–356 and accompanying text.

¹²⁸ *See infra* notes 130–163 and accompanying text.

¹²⁹ *See infra* notes 358–386 and accompanying text.

¹³⁰ 1 RECORDS, *supra* note 29, at 15 (May 29), 21–22 (Madison's notes). Perhaps because he was "handsome" and "eloquent," IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800, at 199 (1950), Randolph was the spokesman for the Virginia delegation; he had consulted with the other members about the plan. *See* Letter from James Madison to John Tyler, in 3 RECORDS, *supra* note 29, at 524, 525.

tional government.¹³¹ Though historical sources differ about some of the plan's details, such as whether it contemplated simply an undifferentiated "National Judiciary" or organized the branch into "one or more supreme tribunals" and "inferior tribunals," the language that became the head of the Extension Clause is clear: "jurisdiction . . . shall be to hear & determine [various types of cases]."¹³²

The week that followed brought conflict over the anticipated proliferation of federal courts.¹³³ The delegates eventually agreed on the "Madisonian compromise," which punted the decision of whether to establish inferior courts to the national legislature.¹³⁴ Through it all, the basic structure and terminology of the budding Extension Clause survived, including the term "jurisdiction."

Soon after, on June 13, following discussions about the substantive content of the clause, Randolph successfully introduced a resolution using a new verb but still with the same subject: "[T]he jurisdiction of the national Judiciary shall extend to [a variety of cases]."¹³⁵ At the end of July, a five-man Committee of Detail began the task of turning the various resolutions agreed on by the Convention into a working draft of a constitution.¹³⁶ In each of the two significant drafts that emerged from the committee, the developing Extension Clause did not yet mention the "judicial power" but otherwise continued to resemble the

¹³¹ See 2 RECORDS, *supra* note 29, at 555 (Sept. 10), 560 (Madison's notes) (relating Randolph's conviction of a need for "radical changes"); RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 88 (2009) (calling Randolph's plan "an entirely new conception of the fledgling American government" and "a revolutionary step").

¹³² Compare JOHN FRANKLIN JAMESON, STUDIES IN THE HISTORY OF THE FEDERAL CONVENTION OF 1787, at 103–06 (1903) (compiling what John Franklin Jameson thought the original version would most likely have been and referring only to a "National Judiciary"), with 1 RECORDS, *supra* note 29, at 15 (May 29), 21–22 (Madison's notes) (referring to "supreme" and "inferior" tribunals). In his widely cited *Records*, Max Farrand acknowledged the unavailability of the original Virginia Plan. 3 RECORDS, *supra* note 29, at app. C, 593–94 (respecting though disagreeing with the alternative perspective).

¹³³ See, e.g., 1 RECORDS, *supra* note 29, at 115 (June 5), 124–25 (Madison's notes).

¹³⁴ See *id.* at 115 (June 5), 118 (journal), 127 (Yates's notes); *infra* notes 330–357 and accompanying text.

¹³⁵ 1 RECORDS, *supra* note 29, at 223 (June 13), 223–24 (journal), 232 (journal and Madison's notes).

¹³⁶ 2 *id.* at 116 (July 26), 117 (journal), 128 (Madison's notes). The committee was formed on July 24 for the purpose of composing constitutional language reflecting the resolutions that had been passed by the full Convention. See *id.* at 97 (July 24), 97 (journal), 106 (Madison's notes).

eventual final version: "The jurisdiction of the supreme [tribunal or Court] shall extend" ¹³⁷

2. The Late Shift to "Judicial Power"

It was not until August 27 that the full Convention again focused on the judiciary.¹³⁸ On that day, it made a fateful edit that would unwittingly cloud future interpretation of the Extension Clause.¹³⁹

The Committee of Detail had drafted a provision permitting the legislature to "assign any part of the [Supreme Court's] jurisdiction . . . , in the manner, and under the limitations which it shall think proper, to . . . Inferior Courts" ¹⁴⁰ That language would not last. After some adjustments to the substantive list of cases and controversies and the allocation of original and appellate jurisdictional form, the Convention amended the subject of the Extension Clause from the "jurisdiction of the Supreme Court" to the "Judicial Power,"¹⁴¹ thus embracing all Article III courts. Soon after, on the same day, the provision about assigning jurisdiction to inferior courts was struck; in light of the newly broadened subject of the Extension Clause, the assignment clause was presumably deemed unnecessary.¹⁴²

¹³⁷ See 4 *id.* at 37 (Randolph draft) (transcribed from the original), 47 ("tribunal"); see also 2 *id.* at 137 (Randolph draft) (transcribed from a facsimile), 146; *id.* at 163 (Wilson draft), 172 ("Court") (using slightly different capitalization).

¹³⁸ *Id.* at 422, (Aug. 27), 423–25 (journal), 428–32 (Madison's notes).

¹³⁹ See *infra* notes 140–163 and accompanying text.

¹⁴⁰ 2 RECORDS, *supra* note 29, at 176 (Aug. 6), 186–87 (Madison's notes) (report of the Committee of Detail).

¹⁴¹ *Id.* at 422 (Aug. 27), 425 (journal) ("Judicial Power"), 431 (Madison's notes) ("Judicial power"). The phrase did not have any particularly well-defined meaning. See Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 203 & n.51 (2001) ("The judicial Power' simply was not a term that received serious attention during the founding period.").

¹⁴² See 2 RECORDS, *supra* note 29, at 422 (Aug. 27), 425 (journal), 431 (Madison's notes). Most scholars have surmised that the reason for the deletion of the assignment clause was redundancy. *E.g.*, Claus, *One Court*, *supra* note 47, at 85 (calling the clause "surplusage"); David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 488 n.159 (1991) (opining that the assignment clause "ceased to be crucial" once the "Judicial Power" edit was made); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 621 (1994) (calling the clause "redundant"); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 164 & n.34 (1960) (calling the clause "superfluous" as a result of the change to "Judicial Power"); Velasco, *supra* note 14, at 733 (calling the clause "unnecessary"). Whether the legislature retained the prerogative to restrict the jurisdiction of inferior courts it established—perhaps on the theory that the power to create includes the power to control—is beyond the scope of this Article. See

The change to “Judicial Power” was effected without dissent and without recorded debate. One reason for the change may have been to pave the way for the deletion of the assignment clause. The Madisonian compromise had been a bruising battle,¹⁴³ and the fewer the references to potential inferior courts, the more elegant and less controversial the judiciary article became.¹⁴⁴ There was no parallel language about legislative limitations on the Supreme Court’s jurisdiction, and nothing suggests that the combination of the jurisdictional provisions of the supreme and inferior courts silently incorporated such restrictions.

One signal that “Judicial Power” was meant to include jurisdiction is a motion made later in the day to amend the Appellate Jurisdiction Clause. The proposal would have followed the Original Jurisdiction Clause, which listed cases in which “[t]he supreme Court shall have original *jurisdiction*.”¹⁴⁵ Yet the proposal (which did not pass) read, “In all the other cases before mentioned the *judicial power* shall be exercised in such manner as the Legislature shall direct.”¹⁴⁶ The link between those sentences, evident by the reference to the “other” cases, shows that—at the very least in the mind of the delegate making the proposal—original *jurisdiction* was a manner of exercising the *judicial power*.

Likewise, during the debate about Randolph’s resolution about the jurisdiction of the national judiciary, New York’s Robert Yates in his notes used one term for the other: “Randolph observed the difficulty in establishing the powers of the judiciary”¹⁴⁷ The actual resolution in question used only the term “jurisdiction,” both originally and in the revised form proposed by Randolph.¹⁴⁸ Yet Randolph—or at least Yates—apparently saw no problem with characterizing jurisdiction as a judicial power.¹⁴⁹ To suggest that the later shift of terms conveyed a shift of control is to ignore this overlapping usage.¹⁵⁰

Glashausser, *supra* note 4, at 1419 n.181 (discussing the deletion of the assignment clause); *supra* note 69 and accompanying text (sketching the “greater power” argument).

¹⁴³ See *infra* notes 330–356 and accompanying text (detailing the debates leading to the compromise).

¹⁴⁴ See *infra* text accompanying notes 368–371 (discussing a way to minimize such references).

¹⁴⁵ 2 RECORDS, *supra* note 29, at 422 (Aug. 27), 425 (journal) (emphasis added).

¹⁴⁶ *Id.* at 422 (Aug. 27), 425 (journal), 431 (Madison’s notes) (emphasis added).

¹⁴⁷ 1 *id.* at 223 (June 13), 238 (Yates’s notes).

¹⁴⁸ *Id.* at 15 (May 29), 21–22 (Madison’s notes); *id.* at 209 (June 12), 211 (journal), 220 (Madison’s notes).

¹⁴⁹ See *id.* at 223 (June 13), 238 (Yates’s notes).

¹⁵⁰ See 3 BLACKSTONE, *supra* note 29, at *32 (categorizing courts from those whose “jurisdiction . . . is . . . narrow” to those with the most “extensive . . . power”); 1 *id.* at *258 (noting that by the crown’s delegation of “judicial power,” courts acquire “jurisdiction,”

Perhaps the clearest indication that the change from jurisdiction to judicial power did not derogate jurisdiction came in a comment by James Madison during a debate about the admission of new states. One concern was the need to protect claims of the United States to western territories.¹⁵¹ To address that concern, Maryland's Daniel Carroll moved to add language to the provision about the admission of new states: "Provided nevertheless that nothing in this Constitution shall be construed to affect the claim of the U. S. to vacant lands ceded to them by the Treaty of peace."¹⁵² Madison saw no need to insert such language, thinking it best not to address that issue at all.¹⁵³ His basis for not worrying about protecting claims of the United States was telling. The nation's interests would already be protected, in that the nation's courts would be the ones adjudicating disputes about those lands. In his words, such claims of the United States would be "favored by the jurisdiction of the Judicial power of the U— S— over controversies to which they should be parties."¹⁵⁴

That jurisdictional category (U.S.-party controversies) had been added to the Extension Clause three days earlier,¹⁵⁵ on the same day as (and just before) the switch from "jurisdiction" to "Judicial Power."¹⁵⁶ To Madison, the extension of (at the time) "jurisdiction" to U.S.-party controversies was not transformed into something less when moments later it became an extension of "judicial power." Instead, his precise phrasing—"the jurisdiction of the Judicial power"—suggests that juris-

which the crown cannot then unilaterally abrogate); A NEW LAW DICTIONARY (London, Giles Jacob & J. Morgan eds., 10th ed. 1782) (citing Blackstone for the bulk of an alphabetized entry, on an unnumbered page, for "judicial power"). Early statutes in Virginia provide examples of the blending of the two words. One provided that "the . . . General Court shall take Cognisance of, and [is] hereby declared to have Power and Jurisdiction to hear and determine, all Causes." Act of General Assembly, 1753, ch. I, § V (1753), in THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA 293 (1769). Another provided that "the Justices of every County Court . . . are hereby declared to have Power, Authority, and Jurisdiction, to hear and determine all Causes." Act of General Assembly, 1748, ch. IV, § V (1748), in THE ACTS OF ASSEMBLY, NOW IN FORCE, IN THE COLONY OF VIRGINIA, *supra*, at 169.

¹⁵¹ 2 RECORDS, *supra* note 29, at 457 (Aug. 30), 465–66 (Madison's notes).

¹⁵² *Id.*

¹⁵³ *Id.* at 457 (Aug. 30), 465 (Madison's notes).

¹⁵⁴ *Id.* If anything, Madison viewed the proposed language as leaning too much in favor of the union; he proposed, successfully, that if the unnecessary language were included, it ought to be balanced by a parallel reference to claims of individual states. *Id.*

¹⁵⁵ *Id.* at 422 (Aug. 27), 423 (journal) 430 (Madison's notes) (indicating that the motion to insert passed).

¹⁵⁶ *Id.* at 422 (Aug. 27), 425 (journal), 431 (Madison's notes).

diction is a facet or dimension of the judicial power.¹⁵⁷ Nothing in his comment implies that this “jurisdiction of the Judicial power” would be subject to congressional control.

Madison’s comment switched the focus of the state-admission debate to jurisdiction. Carroll withdrew his motion, substituting a new one that added the following point: “but all such claims shall be examined into & decided upon, by the Supreme Court of the U. States.”¹⁵⁸ Pennsylvania’s Gouverneur Morris moved to substitute different language at the front (instead of what was in Carroll’s original motion) and leave off the part about the Supreme Court.¹⁵⁹ Maryland’s Luther Martin moved to amend Morris’s proposal by reinstating that part.¹⁶⁰ Morris protested that such language was “unnecessary, as all suits to which the U. S— are parties— are already to be decided by the Supreme Court.”¹⁶¹ Martin, though, wanted to “remove all doubts.”¹⁶² Martin’s amendment was rejected, and Morris’s motion was approved.¹⁶³ Apparently, it was too obvious that the Extension Clause would guarantee the Supreme Court’s jurisdiction over a case listed there to warrant repeating the point elsewhere.

Though the state-admission debate was not directly about Article III, its terms help confirm that the shift from “jurisdiction” to “Judicial Power” did not undermine the Supreme Court’s jurisdiction; it simply embraced inferior courts within the scope of the Extension Clause. The jurisdictional grant in the final version of Article III may not be as explicit as it first was in drafts, but the Court’s jurisdiction nonetheless remains an irrepressible dimension of its judicial power.

III. THE FORCEFUL FUTURITY OF “SHALL”

Thomas Paine’s revolutionary exegesis notwithstanding,¹⁶⁴ the interpretation of directives turning on “shall” is a judicial bugaboo. As judges have practically stripped it of any inherent meaning, the word has become a Rorschach test. Is it a command— “thou shalt not kill”? A

¹⁵⁷ Cf. 2 RECORDS, *supra* note 29, at 434 (Aug. 28), 439 (Madison’s notes) (noting the statement of Gouverneur Morris that, on the subject of interference with private contracts, “[t]he Judicial power of the U—S—will be a protection in cases within their jurisdiction”).

¹⁵⁸ *Id.* at 457 (Aug. 30), 465–66 (Madison’s notes).

¹⁵⁹ *Id.* at 457 (Aug. 30), 466 (Madison’s notes).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Presumably, Morris did not consider the possibility of inferior courts.

¹⁶² *Id.*

¹⁶³ 2 RECORDS, *supra* note 29, at 457 (Aug. 30), 466 (Madison’s notes).

¹⁶⁴ See *supra* text accompanying note 19.

definitive prediction—“we shall overcome”? Or something more tentative—“shall we dance?”

Modern legal writing guru Bryan Garner has gone so far as to identify eight distinct senses for “shall” in legal documents.¹⁶⁵ Though most senses denote a duty,¹⁶⁶ the word’s nature is on occasion, as Garner puts it, “directory”—stronger than precatory but weaker than mandatory.¹⁶⁷ Along similar lines, the classic grammarian Henry Fowler wrote that “shall” has both descriptive and prescriptive meanings and thus could function in both the indicative or imperative moods.¹⁶⁸ Eighteenth-century lexicographer Dr. Samuel Johnson threw up his hands: “The explanation of *shall*, which foreigners and provincials confound with *will*, is not easy; and the difficulty is increased by the poets, who sometimes give to *shall* an emphatical sense of *will*”¹⁶⁹ Put simply, depending on the context, “shall” can convey obligation, certainty, or futurity.¹⁷⁰

Advocates of the conventional view of congressional control of the U.S. Supreme Court’s appellate jurisdiction have seized on that ostensible indeterminacy to claim that the provision that the judicial power “shall” extend to the listed categories of cases and controversies poses no hurdle. For example, one traditionalist has insisted that the “shall” in the Extension Clause “has a [less] imperative ring” than that in the Original Jurisdiction Clause.¹⁷¹ As this Part explains, the word can be

¹⁶⁵ BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 939–40 (2d ed. 1995) (decrying the word’s “promiscuity”).

¹⁶⁶ See BLACK’S LAW DICTIONARY 1176–77 (9th ed. 2009) (describing the sense of “duty” as “the mandatory sense that drafters typically intend and courts typically uphold”).

¹⁶⁷ GARNER, *supra* note 165, at 278–79, 940; see also DAVID MELLINKOFF, MELLINKOFF’S DICTIONARY OF AMERICAN LEGAL USAGE 402–03 (1992) (noting the contextual differences in its meaning); Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1777 (2004) (noting that although the word “has imperative overtones,” it “often preserves some measure of discretion”).

¹⁶⁸ See generally H.W. FOWLER & F.G. FOWLER, THE KING’S ENGLISH 142–61 (3d ed. 1931) (comparing “shall” and “will”).

¹⁶⁹ 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al., 6th ed. 1785) (no pagination).

¹⁷⁰ See Joseph Kimble, *The Many Misuses of Shall*, 3 SCRIBES J. LEGAL WRITING 61, 64 (1992) (describing the word’s “legacy of confusion”).

¹⁷¹ Meltzer, *supra* note 14, at 1597 (critiquing Akhil Amar’s partial theory of mandatory federal jurisdiction); see Amar, *supra* note 38, at 239–40 n.118 (pointing out this inconsistency in traditionalists’ interpretations of “shall”); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1524–25 (1990). Steven Calabresi’s work has illustrated the stakes riding on the interpretation of “shall.” In a 1992 article, he did not take a position on the meaning of “shall” but observed that a non-mandatory reading “devastates” theories of mandatory jurisdiction. Calabresi & Rhodes, *supra* note 30, at 1209–10 & n.270. Fifteen years later, he acknowledged that “‘shall’ . . . normally means

somewhat protean, but its meaning is usually clear in context, and nothing about its usage in the Extension Clause suggests that the viability of the judicial power depends on legislative prerogative.

A. *Prescription or Permission*

One axis of common confusion has been whether “shall” can be interpreted as if it were “may.” The committee “restyling” the Federal Rules of Civil Procedure in 2006 cited that potential slipperiness as a justification for amending each “shall” in the old rules to “must,” “may,” or “should,” depending on the context.¹⁷² Likewise, some scholars have argued that the Extension Clause is ambiguous because “it does not say, one way or the other, whether ‘shall’ is mandatory.”¹⁷³ Another has been less equivocal: “[T]he words ‘shall extend’ are more permissive

‘must’” and thus embraced a theory of mandatory jurisdiction, at least for the disputes described in the Extension Clause as “all Cases.” Calabresi & Lawson, *supra* note 47, at 1013–14 & n.65 (relying on instances of “shall” in Article III’s Vesting Clause, Extension Clause, and Original and Appellate Jurisdiction Clauses).

¹⁷² See ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, at D-8 (2006), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Appendix_D.pdf (referring to “shall” as “inherently ambiguous”). One of the committee’s goals was blunt:

Banish *shall*. The restyled civil rules . . . use *must* instead of *shall*. *Shall* is notorious for its misuse and slipperiness in legal documents. No surprise, then, that the Committee changed *shall* to *may* in several instances, to *should* in several other instances, and to the simple present tense when the rule involves no obligation or permission

COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *Guiding Principles for Restyling the Civil Rules*, in PRELIMINARY DRAFT OF PROPOSED STYLE REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE at x, xviii (2005), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf; see also Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 164 (2006) (ruing the change wrought by the elimination of “shall” from Rule 65).

The word “shall” was later restored to the summary judgment rule—after an awkward three-year reign of “should”—in an attempt to direct judges to grant such motions when appropriate while still reflecting the delicate dollop of discretion accorded by precedent. See FED. R. CIV. P. 56 advisory committee’s note (noting that “neither of the choices available under the Style Project conventions—‘must’ or ‘should’—is suitable”). In that context, the protean nature of “shall” reflected the irreconcilability of the case law. See *id.* (citing conflicting language from two Supreme Court cases decided on the same day); Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1149–60 (2010) (chronicling the restoration of “shall” to Rule 56).

¹⁷³ *E.g.*, Wells & Larson, *supra* note 28, at 96 (finding the Extension Clause to be unsuceptible to textual interpretation).

than mandatory; they are better interpreted as 'can include' rather than as 'must include.'"¹⁷⁴

Justice Benjamin Cardozo differed, describing "shall" as "the language of command."¹⁷⁵ Indeed, the Supreme Court has generally read that auxiliary word as making the main verb following it mandatory.¹⁷⁶ It has, however, recognized the confusion stemming from "shall" and has on occasion construed it to signal permission, as if it were "may."¹⁷⁷

But those two words are not interchangeable.¹⁷⁸ The linguistic circumstances in which the odd "may"-for-"shall" interpretation arises are limited. For example, a statutory provision that a defendant "shall" be prosecuted has not prevented the government from choosing to prosecute instead under a different act;¹⁷⁹ likewise, a corporate charter providing that process "shall" be served on the corporation in a certain manner has not barred the legislature from later enacting other means

¹⁷⁴ Velasco, *supra* note 14, at 704; *see id.* at 705 n.167 ("Congress cannot be required to grant jurisdiction . . . because 'shall' is not a mandate to Congress.").

¹⁷⁵ *Escoe v. Zebst*, 295 U.S. 490, 493 (1935) (ordering the release of a prisoner on the ground that the district court had bypassed the statutory mandate that a probationer "shall" receive a court hearing before being imprisoned for violation of probation); *see also* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 209 (2003) ("[In the eighteenth century] as now, in legal discourse the term 'shall' was nearly always a mandatory command.").

¹⁷⁶ *E.g.*, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (interpreting a rule providing that a case "shall" be dismissed if no substitution is made within two years of the death of a party as offering the court no discretion, despite the potential interaction of a rule allowing the expansion of time periods based on "excusable neglect"); *see also* *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (commenting on the statutory language "shall forfeit" that "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory").

¹⁷⁷ *E.g.*, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430–34 & n.9 (1995) (5–4 decision) (holding that despite the statutory provision that "[u]pon certification by the Attorney General . . . any civil action or proceeding . . . shall be deemed an action against the United States . . . , and the United States shall be substituted as the party defendant," certification was not conclusive of the propriety of substitution of the United States). Noting that legal writers "sometimes use, or misuse, 'shall' to mean 'should,' 'will,' or even 'may,'" the *Gutierrez de Martinez* Court proceeded to interpret the statute in that fashion. *Id.* at 432–33 n.9. "May," of course, has its own ambiguity, in that it can convey either permission or possibility.

¹⁷⁸ *But cf.* Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 AM. J. LEGAL HIST. 453, 454 (2010) (cautioning against using "presentism" to overestimate the gap between those words in 1787).

¹⁷⁹ *Richbourn Motor Co. v. United States*, 281 U.S. 528, 534 (1930) ("The usual provision[] of criminal statutes that the offender 'shall' be punished as the statute prescribes is not necessarily to be taken, as against the government, to direct prosecution under that rather than some other applicable statute.").

of service.¹⁸⁰ Of course, prosecution or service in the first place is not always required. For example, the old Rule 59(b) of the Federal Rules of Civil Procedure read, “A motion for a new trial shall be served not later than 10 days after the entry of the judgment.”¹⁸¹ That rule did not compel that a motion be made, any more than the current rule’s “must” does. The understood background was and continues to be “if the motion is made at all.”¹⁸²

Because no analogous linguistic framework underlies the Extension Clause,¹⁸³ there is no reason to read “shall extend” as “may extend.”¹⁸⁴ The claim that the Extension Clause is ambiguous for failing to specify whether the “shall” is mandatory rings hollow; a document need not spell out the interpretation of its own words to be understandable. Whatever ambiguity arises in other contexts about whether “shall” is merely permissive, its usage in the Extension Clause is clear.

A potentially distracting point is that if a power *shall* extend, then logically the power *may* be used.¹⁸⁵ The Extension Clause’s “shall” makes the extension of the judicial power definitive but does not in and of itself compel the judiciary to exercise it.¹⁸⁶ In defense of the traditional view, Daniel Meltzer seizes on that nuance in an attempt to dismiss the notion that the “shall” is mandatory: “One can easily read ‘the judicial Power shall extend’ as referring only to matters over which

¹⁸⁰ R.R. Co. v. Hecht, 95 U.S. 168, 170 (1877) (“As against the government, the word ‘shall,’ when used in statutes, is to be construed as ‘may,’ unless a contrary intention is manifest.”).

¹⁸¹ See FED. R. CIV. P. 59, 28 U.S.C. app. 247 (2006 & Supp. I 2008) (amended 2010) (providing the former text of Rule 59).

¹⁸² See *Gutierrez de Martinez*, 515 U.S. at 432 n.9 (noting that certain procedural rules use the word “shall” to “authorize, but not to require, judicial action”).

¹⁸³ Perhaps the closest is the canon of construction that “shall” generally means “may” when the actor is the government. *Hecht*, 95 U.S. at 170. The purpose of that canon, however, is to preserve governmental prerogative vis-à-vis the public. See *id.* It is not to reallocate power from one branch of the government to another.

¹⁸⁴ See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331–32 (1816) (Story, J.) (rejecting that proposed reading); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §§ 1588–1589, at 452–53 (Boston, Hilliard, Gray & Co. 1833) (same).

¹⁸⁵ Some legislative and executive authority is granted by provisions that the relevant branch “shall have power” to act and some by provisions that it “may” act, with no apparent difference. Compare, e.g., U.S. CONST. art. I, § 8 (“The Congress shall have Power To lay and collect Taxes . . .”), and *id.* art. II, § 2 (“The President shall have Power to fill up all Vacancies . . .”), with *id.* art. II, § 1 (“Congress may determine the Time of chusing the Electors . . .”), and *id.* art. II, § 3 (“[The President] may, on extraordinary Occasions, convene both Houses . . .”).

¹⁸⁶ See *supra* text accompanying notes 40–43 (stressing the Supreme Court’s lack of obligation to exercise its power in every case).

the federal courts have capability (rather than an obligation)”¹⁸⁷ That reading is not unreasonable but is a non sequitur.¹⁸⁸ It is true that federal courts have a capability rather than an obligation; the phrase is “judicial Power,” not “judicial Duty.”¹⁸⁹ That point, though, is distinct from the question of whether the extension of that power is, as the traditionalists claim, subject to legislative approval.¹⁹⁰

Of course, power may be used even if the power *may* extend; the difference is that a legitimate question then arises about who decides whether the power will in fact extend. If the Extension Clause’s “shall” were (or could be interpreted as) “may,” the judiciary might be able to determine when its own power would extend, perhaps collapsing that inquiry with that of when to wield it. One might reasonably argue, though, that in that counterfactual scenario, Congress would be the appropriate body to prescribe the extent of the judicial power, in a law “necessary and proper for carrying [that power] into Execution.”¹⁹¹ Be that as it may, in the actual Extension Clause, the “shall” means that

¹⁸⁷ Meltzer, *supra* note 14, at 1596 (critiquing Akhil Amar’s partial theory of mandatory jurisdiction); *accord id.* at 1573 n.14. Likewise, another traditionalist scholar has conflated the two issues: “If ‘shall extend’ is mandatory, then the federal courts may be required to hear many cases. The constitutional text could then be paraphrased as follows: ‘The judicial power must be exercised in the following cases’” Velasco, *supra* note 14, at 702 (arguing that the phrase is not mandatory). That reading equates authority with obligation. Instead, the import of a mandatory “shall” would be simply that the judicial power unquestionably extends to the listed disputes; whether judges would have a duty to exercise that power in a given case or controversy is a separate question.

¹⁸⁸ Along similar lines, John Harrison paraphrases the head of the Extension Clause as follows: “The judicial power may be used to decide” Harrison, *supra* note 17, at 212. Because the extension of power permits it to be used, that “may” in and of itself is not as misleading as it looks. *Cf.* Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 862 (criticizing Harrison for flipping “shall” to “may”). But more to the point, both Harrison and Meltzer, without justification, find that capability to be contingent on legislative approval. *See* Harrison, *supra* note 17, at 214 (referring to Congress’s “power to alter” the Supreme Court’s jurisdiction); Meltzer, *supra* note 14, at 1569–73 (defending the view that “Congress has plenary authority”).

¹⁸⁹ *See* Amar, *supra* note 38, at 233 n.96 (calling it “plausible” that the judicial power may be waivable); *infra* text accompanying notes 219–231 (describing the debate at the Convention about whether the new government “shall” discharge states’ debts or merely “shall have power” to do so).

¹⁹⁰ *See* Amar, *supra* note 38, at 233 n.96 (adding that “[i]f the judicial power may be waived, . . . it can only be waived by Article III judges, . . . not . . . by Congress”). Though intended to blunt the force of “shall,” Meltzer’s comment plays into the hand of theories of mandatory jurisdiction in suggesting that federal courts “have” (rather than “may, if Congress assents, have”) capability. *See* Meltzer, *supra* note 14, at 1596.

¹⁹¹ *See* U.S. CONST. art. I, § 8, cl. 18.

nobody needs to make that decision. The delegates made it in Philadelphia.

B. *Prescription and Prediction*

The other common uncertainty about “shall” is whether it denotes duty or futurity.¹⁹² A modern drafting guide for the federal government advises that because that word “imposes an obligation . . . , but may be confused with prediction of future action,” regulations should use “must” for obligations and “will” for predictions.¹⁹³ Such confusion is manifest in a justification advanced in support of the orthodox view of the Extension Clause, namely, that its “shall” is merely predictive.¹⁹⁴ For example, in his concurring opinion in the landmark 1816 case of *Martin v. Hunter's Lessee*, Justice William Johnson insisted that in that clause it was “plain and obvious” that the word was used “in the future sense, . . . [with] nothing imperative in it.”¹⁹⁵

¹⁹² See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 760–61 (1999) (explaining a passage by Justice Joseph Story about whether “shall” in the Article III Vesting Clause is “a future-tense verb or an imperative verb”); Tillman & Tillman, *supra* note 178, at 454–55 (discussing the eighteenth-century usage of “shall” in its “mandatory” sense and in its sense “indicating futurity”).

¹⁹³ *Drafting Legal Documents: Principles of Clear Writing*, OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., <http://www.archives.gov/federal-register/write/legal-docs/clear-writing.html> (last visited Sept. 1, 2012) (advising writers of documents for publication in the Federal Register).

¹⁹⁴ E.g., *Martin*, 14 U.S. at 374 (Johnson, J., concurring); REDISH, *supra* note 18, at 37–38 (casting doubt on whether “shall” implies a mandate as opposed to the future tense).

¹⁹⁵ *Martin*, 14 U.S. at 374–75 (Johnson, J., concurring). The *Martin* case turned specifically on whether Congress could authorize the Supreme Court to exercise jurisdiction over cases originating in state courts, not whether Congress could withhold it, but the case served generally as the platform for a wide-ranging analysis of Article III, with “shall” playing a prominent role. The Virginia Court of Appeals had defied a Supreme Court decision reversing its judgment; the Virginia court's rationale was that Congress's grant of appellate jurisdiction to the Supreme Court in such cases exceeded Article III's limits on the federal judicial power. *Id.* at 305–06 (Story, J.). Arguing that the Supreme Court had properly exercised jurisdiction, counsel for the petitioner focused on the Extension Clause: “The word *shall*, is a sign of the future tense, and implies an imperative mandate” *Id.* at 314.

Seeking to minimize the federal judicial power, the respondent's counsel disagreed with that assessment: “*Shall* is merely a sign of the future tense, and not imperative ‘Extend,’ or ‘shall extend,’ merely imports that [the judicial power] *may* extend.” *Id.* at 316–17 (arguing that if “shall” were imperative, laws giving federal and state courts concurrent jurisdiction would be unconstitutional). Allowing the Supreme Court to review state court decisions, he contended, would be “inconsistent with the whole genius, spirit, and tenor of the constitution.” *Id.* at 316 (arguing that the Constitution operated on individual persons rather than on “state authorities”).

In his opinion for the Court upholding its jurisdiction, Justice Story expatiated on not only the breadth but also the definitiveness of Article III. As to the Extension Clause, he stressed that “the words are used in an imperative sense,” resulting in a legislative duty to

To be sure, the “shall” in the Extension Clause is not a direct mandate; if it orders any constitutional entity to act, that entity, Congress, is only implied. Still, one might say that as part of the legislature’s enactment of housekeeping laws “necessary and proper for carrying into Execution” the judicial power,¹⁹⁶ it “shall” (i.e., must) extend that power to the listed categories of disputes. But even if one reads the “shall” merely as intimating the future, such that the Extension Clause is not an order at all but simply a pronouncement of what is to be, that pronouncement is nonetheless definitive: the judicial power “shall” (i.e., will¹⁹⁷) extend. That extension could occur via a perfunctory imple-

execute the constitutional mandate. *Id.* at 328, 331. In his view, that mandate left no room for Congress to withhold any jurisdiction from the federal courts collectively, at least in the categories of disputes headed by “all Cases” as opposed to “Controversies.” *Id.* at 331, 333–36; see 3 STORY, *supra* note 184, §§ 1588–1590, at 452–54 (reiterating the same view). He even stitched together an argument, skirting a constitutional “may,” that “congress are bound to create some inferior courts.” *Martin*, 14 U.S. at 330–31.

Justice Johnson concurred in the judgment but disagreed with Justice Story’s vision of mandatory jurisdiction, referring instead to Congress as the body with discretionary “power to assume jurisdiction to the constitutional extent.” *Id.* at 375–76 (Johnson, J., concurring) (rejecting any distinction between “all Cases” and “Controversies”). That view of judicial subservience apparently stemmed from his disagreement with Justice Story’s take on the Extension Clause:

[T]he plain and obvious sense and meaning of the word shall, in this sentence, is in the future sense, and has nothing imperative in it. The language of the framers of the constitution is, “We are about forming a general government—when that government is formed, its powers shall extend,” &c. I therefore see nothing imperative in this clause, and certainly it would have been very unnecessary to use the word in that sense; for, as there was no controlling power constituted, it would only, if used in an imperative sense, have imposed a moral obligation to act.

Id. at 374–75.

As provocative as Justice Story’s opinion was in suggesting that inferior courts must be created and in distinguishing between “all Cases” and “Controversies,” history has instead favored Justice Johnson’s vision of broad legislative discretion with respect to the entire menu of federal jurisdiction. But see JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 243 n.228, 246–47 (1971) (opining that by deleting the phrase “when necessary” from a draft of the Constitution, the Committee of Style “robbed Congress of discretion whether or not to create inferior courts”); Amar, *supra* note 38, at 206 (resuscitating Justice Story’s two-tier interpretation). The putatively non-imperative “shall,” however, does not justify that vision any more than do other arguments advanced by proponents of the conventional view.

¹⁹⁶ U.S. CONST. art. I, § 8, cl. 18.

¹⁹⁷ Such a reading is a stretch because “shall” signals emphatic futurity, implying definiteness or inevitability—much more so than “will.” See Margaret Sinclair, “*It Shall Be So*”: Grammatical Usage as Political Intent in *Coriolanus*, J. AESTHETIC EDUC., Winter 2002, at 32, 32 (“Instead of referring to mood or attitude, ‘shall’ generally refers to futurity. Without reference to time, ‘shall’ in the third person signifies determination or purpose.”). The implications of “shall” and “will” are reversed, however, when the subject of a sentence is

menting statute or simply as a constitutional rule that is self-executing upon ratification.¹⁹⁸ Whether the clause is an implicit injunction or a mere declaration of the judiciary's autonomy, it offers Congress no leeway to violate its terms.¹⁹⁹ In the language of litigation, ignoring a declaratory judgment may be less contemptuous than defying a direct court order, but it is no more legal.

In other words, the "duty or futurity" dichotomy is a false one because statements about the future are not inherently permissive. The Extension Clause's "shall" is simultaneously prospective and prescriptive.²⁰⁰ It anticipates what will be done, not as a neutral prediction, but by way of ensuring that result, without room for debate. Congress could no more block the extension of judicial power than it could the establishment of a Supreme Court, in which that power "shall be vested."²⁰¹

"I." *Id.* at 36 n.4 ("To denote inevitability, writers use 'will' with the first person and 'shall' with the third persons.") (citing A.E. ABBOTT, *A SHAKESPEARIAN GRAMMAR* 223 (London, Macmillan & Co. 1897)). The constitutional drafters' sensitivity to that distinction is evident in the principal instance of the word "will": The presidential oath or affirmation includes the phrase, "*I will faithfully execute the Office . . . and will to the best of my Ability, preserve, protect and defend the Constitution . . .*" See U.S. CONST. art. II, § 1, cl. 8 (emphasis added); Tillman & Tillman, *supra* note 178, at 455–56 (comparing "shall" and "will" in a discussion of the possible meanings of "shall" in the Constitution).

¹⁹⁸ Constitutional language in the passive voice, such as the provision that the judicial power "shall be vested," more readily implies the intervention of an implementing statute than does the active "shall extend." But regardless of whether the Extension Clause is self-executing, Congress may not contradict it.

¹⁹⁹ In the slightly different context of Article III's Vesting Clause, Steven Calabresi and Kevin Rhodes have characterized theories of mandatory jurisdiction as dependent on reading "shall" as "must" rather than "will." Calabresi & Rhodes, *supra* note 30, at 1178, 1187–88, 1199–1200, 1209–10 (arguing that the extent of presidential power turns on the same issue in the Vesting Clause of Article II). If "shall" means "will," they contend, then the clause "suggests . . . but does not command." *Id.* at 1188 (declining to take sides in the interpretive debate). But "will" does not mean "may." "[D]escriptive" though the word "will" may be, *id.*, it leaves no room to stray from the description.

²⁰⁰ Despite his forceful insistence in *Martin* that the Extension Clause's "shall" was used in the "future sense" with "nothing imperative" in it, see *supra* note 195 and accompanying text, even Justice Johnson seemed to recognize that his grammatical distinction amounted to little. As a practical matter, he wrote, "wherever power is given it will be used," and thus "the same result arises from using ['shall'] in a future sense." *Martin*, 14 U.S. at 375 (Johnson, J., concurring). My disagreement with him is thus ultimately less about the meaning of "shall" than about his assumption that the power in question was given not to the judiciary but to Congress. See *id.* at 375–76. Because *Martin* concerned the constitutionality of a grant of jurisdiction rather than a restriction, Justice Johnson, despite his apparent cynicism, may not have had occasion to contemplate a ramification of that assumption, namely, that in other contexts, Congress might seek to insulate itself from judicial review by—contrary to his prediction—selectively abnegating its supposed power to extend jurisdiction.

²⁰¹ See Calabresi & Rhodes, *supra* note 30, at 1179 n.125 (raising the possibility that "shall" in the Vesting Clause is "a present tense 'performative' that acquires force from its self-proclaimed status in a constituting document"); cf. *Martin*, 14 U.S. at 328–30 (Story, J.)

The dual role for "shall" is hardly limited to the Extension Clause. That modal verb set the temporal motif of the Constitution. The document was forward-looking, in that it would not govern anyone before ratification by nine states. As a result, with two exceptions, every sentence in the (unamended) Constitution contained a "shall."²⁰² In contrast, the immediately effective Declaration of Independence used but a single "shall"; the dominant tense was the present perfect, serving to list the indignities the king had perpetrated.²⁰³ The original Constitution, in all, used "shall" 191 times.²⁰⁴

For example, writing that all legislative powers "are" vested in Congress would not do, as that description would not be the case until ratification. Thus that opening clause, like those that followed it, was phrased prospectively: "shall be vested."²⁰⁵ One exception was the preamble, in which "We the People" did something then and there, namely, "ordain and establish this Constitution."²⁰⁶ The other was the provision that each house of Congress "may" determine rules of proceedings, punish

(calling all of Article III "mandatory upon the legislature," which has a "duty to vest the whole judicial power"); Clinton, *supra* note 38, at 782 (arguing that "shall" was used "in its mandatory sense rather than as future tense").

In a case interpreting a provision in the Kansas Constitution that "dues from corporations shall be secured by individual liability of the stockholders," the U.S. Supreme Court recognized the definitiveness of "shall" even when the word is not tethered to a specific actor: "The words, 'shall be secured,' are not merely directory to the legislature to make provision for such liability, but of themselves declare it. To this extent the constitution is self-executing." *Whitman v. Oxford Nat'l Bank*, 176 U.S. 559, 560, 562 (1900). *But cf. Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 501 (1841) (interpreting the Mississippi constitutional provision that certain sales of slaves "shall be prohibited" not as a self-executing prohibition per se but rather as a "command" that would be "directory to the legislature").

²⁰² See generally U.S. CONST. Every sentence of the Bill of Rights, other than the Tenth Amendment, also uses a "shall." The Tenth Amendment states simply that powers not delegated to the United States and not prohibited by the Constitution "are" reserved to the states or the people. U.S. CONST. amend. X. That distinction presumably arose because the amendment clarified the existing constitutional order rather than establishing a new right.

²⁰³ See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

²⁰⁴ In a compilation of each occurrence of every word (other than articles, prepositions, and the like) in the text of the Constitution, the entry for "shall" dwarfs all others. See Charles W. Stearns, *Concordance to the Constitution*, in THURSTON GREENE, THE LANGUAGE OF THE CONSTITUTION 969, 1016–20 (Stuart B. Flexner ed., 1991). That usage reflected the drafting style of the time. The other famous national document of the same year, the Northwest Ordinance of 1787, which was constitutional in nature and used many phrases echoed in the later Bill of Rights, likewise contained a "shall" in practically every sentence. See generally Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789). Although the future tense has the logical justification described here, legal drafting literature since the middle of the nineteenth century has advocated the use of the present tense in legislation. GARNER, *supra* note 165, at 939 (tracing that historical development).

²⁰⁵ U.S. CONST. art. I, § 1.

²⁰⁶ *Id.* pmb1.

its members, and even expel them.²⁰⁷ Pivoting from the prescriptive determinacy of “shall,” the word “may” conveyed that the chambers would have powers but no duties in those areas. That use of “may” shows (as do plenty of compound sentences mixing “shall” and “may”) that the Constitution’s drafters knew how to grant discretion when appropriate.²⁰⁸

In short, “shall” was evidently chosen for the Extension Clause, the Legislative Vesting Clause, and others as an alternative not only to “does,” but also to “may.” Not all clauses using “shall” require a specific action; after ratification, nobody was charged with implementing the abstract vesting of the legislative power.²⁰⁹ But those self-executing clauses are still mandatory in that, other than through the amendment procedure, no constitutional actor has discretion to effect a different result.²¹⁰ Regardless of whether the more grammatically faithful reading of the Extension Clause is that the judicial power “must” or “will” extend to the listed categories of disputes, the legislature lacks the power to derail it.

C. Conventional Usage

Towards the end of the Federal Convention, when the Extension Clause underwent a slew of minor edits, including the August 27 change from “jurisdiction of the Supreme Court” to “Judicial Power,”²¹¹ its “shall” went untouched. That was not for lack of appreciation of the

²⁰⁷ *Id.* art. I, § 5.

²⁰⁸ See Amar, *supra* note 171, at 1507–08 (arguing that the selective use of “may” in the Constitution helps show the mandatory nature of “shall”); Barnett, *supra* note 175, at 209 (reasoning that because the constitutional drafters were careful to distinguish it from “may,” “shall” made provisions mandatory); Clinton, *supra* note 38, at 782 & n.147 (cataloguing and contrasting the usage of “shall” and “may” throughout the Constitution); *cf.* Anderson, 329 U.S. at 485 (“[W]hen the same Rule uses both ‘may’ and ‘shall,’ the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.”).

²⁰⁹ In contrast, some prescriptive clauses issue commands to specific bodies, such as the provision that election procedures “shall be prescribed in each State *by the Legislature thereof*.” See U.S. CONST. art. I, § 4 (emphasis added).

²¹⁰ See *supra* note 201 and accompanying text (discussing the lack of discretion afforded by “shall”); *cf.* Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 61 (1982) (holding that the rule providing that early notice of appeal “shall have no effect” was mandatory); ELMER A. DRIEDGER, *THE COMPOSITION OF LEGISLATION* 13 (2d ed. rev. 1976) (noting that “shall” can create a self-executing “rule of law” or a targeted “obligation” and recommending limiting its usage to the latter to avoid ambiguity). *But cf.* Velasco, *supra* note 14, at 703–04, 705 n.167 (interpreting “shall” as “self-executing” but nonetheless defending the traditional view of congressional control on the ground that “shall extend” is “more permissive than mandatory” and is “better interpreted as ‘can include’ rather than as ‘must include’”).

²¹¹ See *supra* notes 138–163 and accompanying text.

word's importance. When discussing other clauses around that time, the delegates showed sensitivity to how "shall" would be interpreted. They understood its potency, and they wielded it purposefully.²¹²

For example, a late draft of the Constitution provided that full faith and credit "ought to" be given in each state to official acts of other states and that the national legislature "shall" prescribe laws governing the details.²¹³ During the discussion about the clause, a motion passed to edit the "shall" to "may," and the "ought to" to "shall."²¹⁴

The language about the President's State of the Union address underwent a similar transformation. The Committee of Detail suggested the following: "He shall, from time to time, give information to the Legislature, of the state of the Union: he may recommend to their consideration such measures as he shall judge necessary, and expedient" ²¹⁵ When the full Convention took up that point on August 24, Pennsylvania's Gouverneur Morris successfully moved to strike "he may" in favor of "and," thus linking "recommend" back to "shall."²¹⁶ James Madison, accentuating the crucial word himself, described the motion's effect as "mak[ing] it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it."²¹⁷

During the debate about how to flesh out a resolution "[t]o secure the payment of the public debt,"²¹⁸ the forcefulness of "shall" took center stage. On August 18, Roger Sherman of Connecticut argued that the Constitution ought to authorize, but not require, Congress to assume state debts; his colleague Oliver Ellsworth disagreed.²¹⁹ Three days later, reporting from a committee that had considered the issue,

²¹² See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1200 (2003) (noting the usefulness of drafting history in determining the "contextual definitions" of words such as "shall").

²¹³ 2 RECORDS, *supra* note 29, at 483 (Sept. 1), 483–84 (journal), 485 (Madison's notes).

²¹⁴ *Id.* at 486 (Sept. 3), 486 (journal), 489 (Madison's notes). Two years later, when drafting the Bill of Rights, James Madison made a similar decision about what became the Eighth Amendment. Tweaking language from England's 1689 Bill of Rights and Virginia's 1776 Declaration of Rights, each of which provided that excessive bail "ought" not to be required, he substituted the stronger "shall." SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 60 (Craig Joyce ed., 2003) (noting that throughout the Bill of Rights, Madison "transform[ed] suggestions into bold declarations"); BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 170 (1992) (tracing the development of the Eighth Amendment).

²¹⁵ 2 RECORDS, *supra* note 29, at 176 (Aug. 6), 185 (Madison's notes) (report of the Committee of Detail).

²¹⁶ *Id.* at 396 (Aug. 24), 398 (journal), 405 (Madison's notes).

²¹⁷ *Id.* (emphasis in original).

²¹⁸ *Id.* at 321 (Aug. 18), 326 (Madison's notes).

²¹⁹ *Id.* at 321 (Aug. 18), 327 (Madison's notes).

New Jersey's William Livingston proposed language tracking Sherman's view: "The Legislature of the U. S. *shall have power* to fulfil the engagements . . . and to discharge as well the debts of the U- S."²²⁰ This time, Elbridge Gerry of Massachusetts spoke in opposition, arguing that the mere power without an obligation to use it would "destroy[] the security" of public creditors.²²¹

When the debate resumed the next day, after a comment by Gerry about the need to avoid a pretext under which the new government might try to avoid the public debt of the old one, Gouverneur Morris took Gerry and Ellsworth's side and successfully moved to amend the proposal to "The Legislature *shall* discharge the debts & fulfil the engagements [of the United States]."²²² In his notes, Madison highlighted the "*shall*,"²²³ as he did again the following day when other language was added to the sentence.²²⁴

Two days later, after a successful motion to reconsider,²²⁵ Virginia's George Mason—known to distrust heavy-handed governments²²⁶—resumed the opposition. According to Madison's notes, "Mason objected to the term, '*shall*' . . . as too strong. It may be impossible to comply with it."²²⁷ Mason continued at length, drawing distinctions among public creditors and arguing that though some were less deserving of being paid, the "shall" would seem to require payment to all; he also feared that "the word '*shall*,' might extend to all the old continental paper."²²⁸ Morris took the other side, opining that he "preferr'd the term '*shall*' as the most explicit."²²⁹ He also noted the political benefit of such an unambiguous provision, which would "create many friends to the plan."²³⁰ Though the sentence was reconfigured and eventually moved from Article I to Article VI, the unqualified "shall" remained.²³¹

²²⁰ *Id.* at 352 (Aug. 21), 355 (journal and Madison's notes) (emphasis added).

²²¹ 2 RECORDS, *supra* note 29, at 352 (Aug. 21), 356 (Madison's notes).

²²² *Id.* at 366 (Aug. 22), 368 (journal), 377 (Madison's notes).

²²³ *Id.* at 366 (Aug. 22), 368 (journal) (not italicizing "shall"), 377 (Madison's notes) (emphasis in original).

²²⁴ *Id.* at 380 (Aug. 23), 382 (journal) (not italicizing "shall"), 392 (Madison's notes) (emphasis in original).

²²⁵ *Id.* at 396 (Aug. 24), 396 (journal), 400 (Madison's notes).

²²⁶ BRANT, *supra* note 130, at 23.

²²⁷ 2 RECORDS, *supra* note 29, at 408 (Aug. 25), 412 (Madison's notes).

²²⁸ *Id.* at 408 (Aug. 25), 412–13 (Madison's notes).

²²⁹ *Id.* at 408 (Aug. 25), 414 (Madison's notes).

²³⁰ *Id.*

²³¹ *Id.*; see U.S. CONST. art. VI.

It was two days later that the delegates amended various aspects of the Extension Clause but left the “shall” intact.²³² In light of the surrounding debates and edits, it is difficult to argue that they failed to appreciate its significance as an unequivocal term of intractability.²³³ It is instead scholars supporting the traditional view who do not grant “shall” its due.

For example, John Harrison has drawn a surprising conclusion from the lexicon of the Constitution. Based in part on the lack of the word “must” anywhere in the text, he insists that one cannot impute a similar meaning to the Extension Clause’s “shall.”²³⁴ He does not explore the broader consequences of that argument, namely, that if no instances of “shall” are tinged with the imperative hue of “must,” then the whole document becomes precatory, more resolution than constitution.

Harrison relies on the basic constitutional principle of limited federal powers. Positing that the Extension Clause must set a ceiling for the judicial power, he argues that reading “shall extend” as a floor would shatter that ceiling.²³⁵ What he does not contemplate is the possibility of a construction merging the two.²³⁶ In fact, there is nothing unique to the Extension Clause in having “shall” install a floor and a ceiling simultaneously. Throughout the Constitution, “shall” establishes fixed norms, including those about the reach of authority of the governmental branches, such as in the provisions directing when “[t]he Congress shall have Power”²³⁷ or “[t]he President shall have Power.”²³⁸

²³² 2 RECORDS, *supra* note 29, at 422 (Aug. 27), 423–25 (journal), 428–32 (Madison’s notes).

²³³ See *supra* text accompanying notes 40–43 (focusing on the difference between capability and obligation).

²³⁴ Harrison, *supra* note 17, at 217 (denigrating Robert Clinton’s theory of mandatory jurisdiction).

²³⁵ *Id.*

²³⁶ Cf. *id.* at 218–19 (citing Robert Clinton’s claim to that effect but dismissing it); Pushaw, *supra* note 188, at 862 (noting the possibility that the same language created both a floor and a ceiling).

²³⁷ See U.S. CONST. art. I, § 8.

²³⁸ See *id.* art. II, § 2. The Extension Clause might cause less confusion if its wording about power more exactly mirrored that in other articles of the Constitution. One scholar defending the traditional view of congressional control of federal jurisdiction has seized on that superficial distinction, arguing that because Article III does not use the “shall have Power” formulation, the judiciary is not in the same posture as the legislative and executive branches. See Velasco, *supra* note 14, at 702 n.150 (rejecting a potential paraphrase of the Extension Clause as “The federal courts must be permitted to exercise the judicial Power over the following cases . . .”). That argument is odd in light of his willingness to bridge linguistic disparities to make apt cross-branch analogies in only slightly different contexts. See,

The branches need not always use the full extent of their powers, but the powers are nonetheless inviolable.²³⁹

It seems true (especially after the Tenth Amendment)²⁴⁰ that, as almost everyone agrees,²⁴¹ the judicial power extends no further than the listed cases and controversies, but it is equally clear that it does extend that far. If the delegates had wanted the legislature to calibrate the extent of judicial power, they could have found a model one constitutional paragraph earlier or later. Section 1 of Article III sets a minimum

e.g., id. at 703 (“[T]he enumeration of cases in Article III [is] analogous to the enumeration of powers in Articles I and II.”). In any event, the Extension Clause’s lack of complete parallelism with grants of power to other branches is simply the unremarkable result of the gradual development of a clause that began as one about the “jurisdiction of the supreme tribunal” rather than about the power of the judiciary *per se*. By the time the word “power” was inserted, the phrase “shall extend” was already entrenched. As detailed above and below, none of that editing had anything to do with conditioning the judiciary’s power on legislative approval. *See supra* notes 138–163 and accompanying text (detailing the history resulting in “judicial Power” as the subject of the clause); *infra* notes 357–386 and accompanying text (detailing the history resulting in “extend” as the verb of the clause).

²³⁹ *See supra* text accompanying notes 40–43, 122–124, 189 (stressing the Supreme Court’s lack of obligation to exercise its power in every case); *infra* text accompanying notes 316–319 (discussing the distinction between the extension of power and the duty to use power).

²⁴⁰ Absent the amendment, the argument rests mainly on the slippery doctrine of *expressio unius est exclusio alterius*.

²⁴¹ *See* *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (holding that a statute “cannot extend . . . [federal] jurisdiction beyond the limits of the constitution”). One who did not agree was constitutional historian William Winslow Crosskey, who pointed to the Extension Clause’s lack of an explicit ceiling on the federal judicial power. 1 CROSSKEY, *supra* note 51, at 619–20. Moreover, Crosskey argued, because all civil litigation between parties within a government’s jurisdiction naturally lies within the judicial power of that government, Congress could, under the Necessary and Proper Clause, extend jurisdiction to disputes beyond the listed cases and controversies. *Id.*

Crosskey’s view is consistent with dicta from the Supreme Court to the effect that a nation’s judicial power embraces “all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto.” *See Kansas v. Colorado*, 206 U.S. 46, 83 (1907). In that case, the Court did not read the specific categories of the Extension Clause as an implicit limitation. *Id.* at 82. Because the dispute was one between states, *id.* at 80, however, the propriety of jurisdiction did not depend on the Court’s expansive interpretation of the clause. In a later case, Justice Robert Jackson wrote for the Court in support of a similar interpretation. *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 590, 600 (1949) (rejecting the notion that “no jurisdiction other than specified in Art. III can be imposed on courts that exercise the judicial power of the United States”). But only two justices joined his opinion; a majority read the Extension Clause more strictly. *See id.* at 607 (Rutledge, J., concurring) (“[T]he words of Article III . . . must mark the limits of the power Congress may confer on the district courts . . .”); *id.* at 628–36 (Vinson, J., dissenting) (relying on drafting and ratification history to argue that the Extension Clause was intended as a ceiling); *id.* at 647 (Frankfurter, J., dissenting) (“The Framers guarded against the self-will of the courts as well as against the will of Congress by marking with exactitude the outer limits of federal judicial power.”).

of a "supreme" court but allows "inferior" courts as well, "as the Congress may from time to time ordain and establish."²⁴² The second paragraph of Section 2 fixes a floor of cases in which the Supreme Court's jurisdiction is original, but those cases can be multiplied via "such Exceptions" to the appellate form of the rest of the Court's jurisdiction "as the Congress shall make."²⁴³ In contrast, Section 2's first paragraph—the Extension Clause—says nothing about Congress.²⁴⁴ When traditionalists interpret "[t]he judicial Power shall extend" as "Congress may extend the judicial power," they distort the clause beyond recognition.

IV. THE PRESENT (NOT POTENTIAL) POTENCY OF "EXTEND"

An early instance of the word "extend" cited in the *Oxford English Dictionary* described Parliament as being "of great strengthe in matters whereunto it extendethe."²⁴⁵ Under the conventional view in the United States, the same cannot be said of the federal judiciary, at least without a qualifier about the putative legislative power to weaken the judicial branch by withdrawing its jurisdiction in matters within its constitutionally "extend[ed]" bailiwick.

One of the arguments made in support of the conventional view of the Extension Clause is that its verb, "extend," signals only the outer reaches of where something may potentially go, if unleashed.²⁴⁶ According to that claim, the judicial power does not, say, "apply" or "attach" unequivocally to the listed cases and controversies; all it does is "extend" to that ceiling, and thus the power is merely dormant until

²⁴² U.S. CONST. art. III, § 1.

²⁴³ See *id.* art. III, § 2. This interpretation of the Exceptions Clause, which is disputed by traditionalists, is elaborated in Glashausser, *supra* note 4, at 1383–86. See also *supra* note 45 and accompanying text (summarizing the conventional interpretation of the Exceptions Clause).

²⁴⁴ U.S. CONST. art. III, § 2. Two other paragraphs in Article III also refer to congressional powers. See *id.* (laying the venue for certain criminal trials "as the Congress may by Law have directed"); *id.* art. III, § 3 ("The Congress shall have Power to declare the Punishment of Treason . . ."). Only the Extension Clause and the paragraph about treason do not. See *id.* art. III, §§ 2–3.

²⁴⁵ 5 OXFORD ENGLISH DICTIONARY 594–95 (2d ed. 1989) (citing 1 JOHN STRYPE, ANALS OF THE REFORMATION app. x. 28 (1559)).

²⁴⁶ E.g., Harrison, *supra* note 17, at 212 (defending the traditional view based on a paraphrasing of the Extension Clause as "The judicial power may be used to decide . . ." or "The judicial power shall be capable of deciding . . ."); Liebman & Ryan, *supra* note 14, at 708 (insisting that "'shall extend to' meant that and not 'shall be'"); *id.* at 721–23, 753 (arguing that editing of the clause about cases and controversies from "shall be" to "shall extend" changed the clause from a jurisdictional floor to a ceiling); Velasco, *supra* note 14, at 703–04 (citing the dictionary definition of "extend" to support the claim that Congress's right to control jurisdiction stems from a "natural reading of the text of the Constitution").

Congress animates it. As this Part explains, however, both the plain meaning and the drafting history of the clause show that the extension of the judicial power is a straightforward, unconditional demarcation of the scope of the power that Article III vests in the judiciary.

A. *More Than a Ceiling*

A paraphrase of the start of the Extension Clause by one defender of the conventional view, John Harrison, exemplifies the interpretation of the clause as merely setting a ceiling of potential jurisdiction: “The judicial power shall *be capable of deciding*”²⁴⁷ Awkward as that may be, it makes sense if one reads “[t]he judicial power” as “the judiciary.” According to Harrison, though, a different branch is empowered to turn the capability into reality. As he notes, the Constitution did not need to decide when the judicial power would actually be exercised. Instead, he insists, “the decision can be left for Congress, as many important choices are.”²⁴⁸

Many indeed are, and this one could have been, as Edmund Randolph’s draft for the Committee of Detail suggested for certain cases.²⁴⁹ But nothing about the actual Extension Clause suggests that it was. Interpreting a provision as delegating decisions to a body that it does not mention is an odd move for a scholar who (rightly) admonishes, in critiquing another’s take on the same provision, that “the Constitution is not drafted in . . . [an] indirect and allusive manner”²⁵⁰ In the absence of instructions to the contrary, whatever choices may exist about whether to exercise the judicial power²⁵¹ would seem to lie with the branch invested with that power—the judiciary.²⁵²

²⁴⁷ Harrison, *supra* note 17, at 212 (emphasis added) (offering “The judicial power may be used to decide . . .” as an alternative).

²⁴⁸ *Id.* at 213 (implying that the Exceptions Clause is the source of that legislative power).

²⁴⁹ See *infra* notes 387–399 and accompanying text (chronicling the drafting and deletion of a provision qualifying a jurisdictional grant with the phrase “as the national legislature may assign”).

²⁵⁰ See Harrison, *supra* note 17, at 217.

²⁵¹ See *supra* text accompanying notes 40–43 (stressing the Supreme Court’s lack of obligation to exercise its power in every case).

²⁵² See U.S. CONST. art. III, § 1 (vesting the judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish”); Amar, *supra* note 38, at 267 (“As a matter of separation of powers, there is a tremendous difference between a *court’s* decision to decline to hear a case that it is empowered to entertain, and a *congressional* attempt to deny the court the *power* to hear that very same case.”).

To be sure, a clause in Article I charges Congress generally with the practical task of putting the Constitution into effect.²⁵³ But in the language of that clause, it is neither “necessary” nor “proper” to recalibrate the extent of a power that has already been extended. As shown by the analysis below of the simple word “extend”—the word Harrison contorted in his paraphrase—the cases and controversies listed in the Extension Clause are not only the ceiling of the U.S. Supreme Court’s jurisdiction, but also its floor.

1. Lexicographical Legerdemain

In the early nineteenth century, John Adams scoffed at the notion of fidelity to the King’s English, urging Americans to develop their own lexicography: “As an independent Nation . . . [w]e are no more bound by [Dr. Samuel] Johnson[’]s Dictionary than by the common or Statute or Cannon Law of England.”²⁵⁴ Noah Webster had animated that brand of post-revolutionary zeal, arguing in 1789 that differentiating American English would have “vast political consequence” by facilitating independence of thought.²⁵⁵ The “honor”—he had recently dropped the

²⁵³ U.S. CONST. art. I, § 8, cl. 18 (empowering Congress to “make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by th[e] Constitution in the Government of the United States”). Some have cited the Necessary and Proper Clause as authority for congressional power over the Supreme Court’s jurisdiction. See, e.g., Eugene Gressman & Eric K. Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495, 500 (1983) (calling the clause “the one provision in the Constitution by which Congress can enact laws . . . withdrawing . . . [the Supreme Court’s] jurisdiction”). But cf. Harrison, *supra* note 17, at 211–12, 248 (minimizing the role of the clause).

²⁵⁴ Letter from John Adams to Benjamin Rush (Feb. 10, 1812), *microformed on 2 THE ADAMS PAPERS*, reel 118, no. 239 (Mass. Historical Soc’y microform ed. 1955). Asserting his own equal “right to make a Word,” he dismissed Dr. Johnson as a “Pedant Bigot and Cynic.” Letter from John Adams to Catherine E. Rush (Feb. 23, 1815), *microformed on 2 THE ADAMS PAPERS*, *supra*, at reel 122, no. 55 (playfully coining the word “Dongle” to describe a joyful sound). Adams had specific ideas about how to overthrow Dr. Johnson’s regime: “We ought to have an American Dictionary: after which I should be willing to lay a Tax of an Eagle a Volume upon all English Dictionaries that should ever be imported.” Letter from John Adams to Benjamin Rush, *supra*. Thomas Jefferson shared in the lexicological militance. See Letter from Thomas Jefferson to John Adams (Aug. 15, 1820), in 2 THE ADAMS-JEFFERSON LETTERS 565, 567 (Lester J. Cappon ed., 1959) (admiring the French model of following a political revolution with a linguistic one and surmising that America could serve as an “example of a colonial dialect improving on it[s] primitive”).

²⁵⁵ NOAH WEBSTER, DISSERTATIONS ON THE ENGLISH LANGUAGE app. at 397–98 (Boston, Isaiah Thomas & Co., 1789) (stressing that “a *national language* is a band of *national union*”).

“u”²⁵⁶—of “an independent nation,” he argued, “require[d] . . . a system of our own, in language as well as government.”²⁵⁷ In 1828, Webster published what is regarded as the first comprehensive American dictionary.²⁵⁸ That was a generation or two after the Constitution, though, and so in the early twenty-first century, despite critics’ admonition that old dictionaries from England were prescriptive rather than descriptive,²⁵⁹ scholars (as well as Supreme Court justices²⁶⁰) often still seem bound by them—particularly Dr. Johnson’s—when explicating eighteenth-century American text.²⁶¹

²⁵⁶ Just six years earlier, Webster had praised Dr. Johnson’s spelling of “-our words.” In the interim, he “launched upon his grandiose plan to establish an independent ‘Federal’ language in the new Republic.” H.L. MENCKEN, *THE AMERICAN LANGUAGE: AN INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES* 381 (4th ed. 1936).

²⁵⁷ WEBSTER, *supra* note 255, at 20.

²⁵⁸ NOAH WEBSTER, *AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (New York, S. Converse, 1828). In 1798, a more obscure American dictionary had been published by someone named, interestingly enough, Samuel Johnson, Jr. *Johnson’s Dictionary*, N.Y. TIMES, Oct. 15, 1898, at 15, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9D0DEEDB1030E333A25756C1A9669D94699ED7CF>.

²⁵⁹ See Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77, 118 (2010) (cautioning that eighteenth-century English dictionaries “listed what words should mean (rather than how words were actually used)”; cf. Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 55 (1993) (noting that the problem stemming from definitions’ illusory sheen of precision is “especially pronounced” when “old dictionaries” are used to interpret old statutes or constitutional provisions).

²⁶⁰ See Kirchmeier & Thumma, *supra* note 259, at 113–19 (noting the recent prevalence of citations to eighteenth-century dictionaries in constitutional cases); Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance with Textualist Principles*, 60 DUKE L.J. 167, 169 (2010) (“[S]everal significant new cases suggest that dictionaries now play a crucial role in the interpretation of the Constitution”); cf. Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438 (1994) (tracking the Supreme Court’s historical dictionary usage and noting that the trend of frequent citations to dictionaries began in the 1980s).

²⁶¹ See, e.g., JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 145 (2005) (citing Dr. Johnson’s original edition in support of his interpretation of the Declare War Clause); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113–14 (2001) (relying on Dr. Johnson’s 1785 entry for “commerce,” as well as on other dictionaries of that era, to support his interpretation of the Commerce Clause); Kesavan & Paulsen, *supra* note 212, at 1200–02 (noting the interpretive force of eighteenth-century dictionaries, though acknowledging the superior usefulness of drafting history). One scholar has criticized reliance on Dr. Johnson’s dictionary in constitutional interpretation on the ground that the good doctor was “on the wrong continent.” Malla Pollack, *What Is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 797 (2001); see also Stuart Streichler, *Mad About Yoo, or Why Worry About the Next Unconstitutional War?*, 24 J.L. & POL. 93, 96 (2008) (criticizing John Yoo’s dictionary-based interpretation as oversimplistic).

Scholarship about the word “extend” is no exception. There is little historical intrigue, however, because its meaning has been static for hundreds of years.²⁶² The definition in Dr. Johnson’s original edition from 1755 would be serviceable in the United States today:

1. To stretch out towards any part. 2. To spread abroad; to diffuse; to expand. 3. To widen to a large comprehension. 4. To stretch into assignable dimensions; to make local; to magnify so as to fill some assignable space. 5. To enlarge; to continue. 6. To [i]ncrease in force or duration. 7. To enlarge the comprehension of any position. 8. To impart; to communicate. 9. To seize by a course of law.²⁶³

As modern scholars relying on the 1773 edition in analyzing the Extension Clause have explained, “[t]he verb ‘to extend’ . . . derives from the Latin ‘*extendere*,’ meaning ‘to stretch [*tendere*] out [*ex*]’ an already existing thing or, in this case, a power.”²⁶⁴

James Liebman and William Ryan cite the first sense of Dr. Johnson’s 1755 definition as well as the above reference to his 1773 edition to support their claim that when the delegates to the Federal Convention edited the verb phrase about the “jurisdiction” of federal courts from “shall be to hear and determine” to “shall extend to,”²⁶⁵ they transformed the Extension Clause from a jurisdictional floor to a ceiling, “leaving the floor-setting duty to the legislature.”²⁶⁶ But those

²⁶² Cf. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009) (citing the constitutional phrase “domestic violence” as an illustration of the interpretive importance of checking whether “dictionary definitions of words changed over time”); Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES, June 14, 2011, at A11 (noting that the resort to old dictionaries for constitutional interpretation “makes sense given that usage may have shifted over time”).

²⁶³ 1 JOHNSON, *supra* note 169 (London, W. Strahan 1755) (no pagination) (examples within each sense omitted); *accord id.* (London, W. Strahan et al., 5th ed. corrected 1773); *id.* (London, W. Strahan et al., 4th ed. corrected 1770); *id.* (Dublin, W.G. Jones, 3d ed. 1768). Other editions added “To amplify: opposed to *contract*.” *Id.* (London, J.F. & C. Rivington et al., 6th ed. 1785); *id.* at 696 (Dublin, Thomas Ewing, 4th ed. rev. 1775).

²⁶⁴ Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 573 (1994) (bracketed words in original) (quoting 1 JOHNSON, *supra* note 169, at 696 (Librairie du Liban ed. 1978) (4th ed. 1773)). Johnson’s dictionary notes that “extend” derives from the Latin “*extendo*,” and it lists “[t]o stretch out towards any part” as one of the senses; it does not break down the Latin verb into its parts. 1 JOHNSON, *supra* note 169, at 696 (Librairie du Liban ed. 1978 (4th ed. 1773)).

²⁶⁵ 1 RECORDS, *supra* note 29, at 223 (June 13), 223–24 (journal), 231 (journal) (compilation of resolutions), 232 (Madison’s notes); *see infra* notes 357–386 and accompanying text (discussing the edit in detail).

²⁶⁶ Liebman & Ryan, *supra* note 14, at 722 & n.129.

sources offer no revelations that advance Liebman and Ryan's argument. None of Dr. Johnson's prescriptions suggests that when a power extends—or stretches, spreads, diffuses, expands, widens, magnifies, enlarges, continues, or increases—it is paradoxically reduced to a state of latency and subservience.

The dictionary citations by Liebman and Ryan are embedded in references to articles by Steven Calabresi (one solo, one with a co-author).²⁶⁷ In other words, rather than invoking Dr. Johnson directly, Liebman and Ryan quote Calabresi's quotations of his entries, which makes one wonder whether Calabresi's take on "extend" might bolster their position. It turns out, however, that Calabresi (and his co-author) consulted Dr. Johnson not to comment on congressional control of jurisdiction, but rather to support the taxonomical contention that the Vesting Clause, rather than the Extension Clause, is the formal source of federal judicial power.²⁶⁸ The verb "extend," in Calabresi's view, "merely 'stretches' forth the judicial power so that it will 'reach' or 'include' the nine categories of cases or controversies."²⁶⁹

²⁶⁷ In a parenthetical explanation of a citation to Calabresi's solo article, Liebman and Ryan quote—as did Calabresi—the first sense of the entry for "extend" in Dr. Johnson's 1755 edition. Liebman & Ryan, *supra* note 14, at 722 n.129 (quoting Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1380–81 & n.14 (1994) (quoting 1 JOHNSON, *supra* note 169 (London, W. Strahan 1755))). In a parenthetical explanation of a citation to the co-written article, they quote the authors' description of the entry for "extend" in Dr. Johnson's 1773 edition. *Id.* (quoting Calabresi & Prakash, *supra* note 264, at 573 (quoting 1 JOHNSON, *supra* note 169, at 696 (Librairie du Liban ed. 1978) (4th ed. 1773))).

²⁶⁸ Calabresi, *supra* note 267, at 1381 n.14 (analyzing Article III's Vesting Clause for the purpose of drawing a parallel with its Article II counterpart); Calabresi & Prakash, *supra* note 264, at 573 ("The etymology and plain dictionary meaning . . . make clear that it is the verb 'vest' in the Article III Vesting Clause that empowers the federal judiciary to act whereas the verb 'extend' can carry no empowering meaning or connotation.").

²⁶⁹ Calabresi, *supra* note 267, at 1381 & n.13 (quoting Calabresi & Rhodes, *supra* note 30, at 1210 n.270); *see also* Calabresi & Prakash, *supra* note 264, at 573 (arguing that rather than serving as an independent power source, the Extension Clause applies power conferred by the Vesting Clause). Calabresi's conclusion seems sensible as far as it goes. The Vesting Clause is the grant of power per se, and the Extension Clause defines the "reach" of that power, or what that power "include[s]." Calabresi's quotation of "reach" and "include" is from his own earlier article, in which he differentiated between those two words as potential senses of "extend." Calabresi & Rhodes, *supra* note 30, at 1210 n.270, *quoted in* Calabresi, *supra* note 267, at 1381 & n.13. Positing a reading of "shall" as "will," he argued in that earlier article that whereas the interpretive formulation "[t]he judicial Power *will* include all cases" could support theories of mandatory jurisdiction, "[t]he judicial Power *will* reach all cases" could not. *Id.* (cryptically commenting that if, conversely, "shall" is read as "must," then theories of mandatory jurisdiction are viable regardless of how "extend" is interpreted). That distinction between "reach or "include," which he did not explain, is unconvincing. Regardless of whether the judicial power shall "extend to" or "reach" or

As to Liebman and Ryan's issue—whether the Extension Clause reserves power for Congress—Calabresi was, in those articles, expressly agnostic: "I t[ake] no position on this question"²⁷⁰ In a later article (with a different co-author), though, he did take a position. Noting the inexorable command of the phrase "shall extend," he embraced, at least for the categories described in the Extension Clause as "Cases," a theory of inviolable federal jurisdiction.²⁷¹

In sum, Liebman and Ryan's citations to Dr. Johnson may add a whiff of lexicographical propriety to their argument, but nothing about his dictionaries supports their thesis. John Adams's exhortations notwithstanding, the upheaval wrought by the American Revolution—despite the auspicious editing of the final word of the Declaration of Independence from the Johnson-approved "honour" to the "u"-free spelling that Webster would later endorse²⁷²—did not extend to every jot of the English language. The straightforward meaning of "extend" centuries ago in Great Britain has endured through the ages, on both sides of the Atlantic.

In a parenthetical, Liebman and Ryan acknowledge as much: "It . . . makes sense to give 'extend to' its eighteenth-century (and current) meaning of flexibly 'reaching' as far as, but not mandatorily including, the entire constitutionally permissible jurisdiction."²⁷³ But their focus on synonyms is a distraction. Their pivotal interpretive move is not choosing "reach" as a substitute for "extend"; it is the insinuation that a power extending to or reaching certain objects does not "mandatorily includ[e]" them. To be sure, possessing power does not mandate its use,

"include" the various cases and controversies, no words in the Extension Clause insinuate that the power is not self-executing or belongs to a body other than the judiciary.

²⁷⁰ Calabresi, *supra* note 267, at 1388 & n.37; *see also* Calabresi & Rhodes, *supra* note 30, at 1209 (stressing the separateness of the question of which section of Article III is the source of judicial power from that of the legislative ability to restrict that power).

²⁷¹ Calabresi & Lawson, *supra* note 47, at 1013–14 & n.65 (reserving judgment on the categories described as "Controversies").

²⁷² *See* JULIAN P. BOYD, *THE DECLARATION OF INDEPENDENCE: THE EVOLUTION OF THE TEXT* 71, 77 (Gerard W. Gawalt ed., rev. ed. 1999) (showing the edit). *Compare* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("Honor"), *and* 1 WEBSTER, *supra* note 258 (no pagination) ("honour"), *with* THOMAS JEFFERSON, *AMERICAN TREASURES OF THE LIBRARY OF CONGRESS, ORIGINAL ROUGH DRAUGHT OF THE DECLARATION OF INDEPENDENCE* (June 1776), *available at* <http://www.loc.gov/exhibits/treasures/images/decp4.jpg> ("honour"), 1 JOHNSON, *supra* note 169 (London, W. Strahan 1755) (no pagination) ("honour"), *and id.* (London, J.F. & C. Rivington et al., 6th ed. 1785) (no pagination) ("honour"). *See generally* MENCKEN, *supra* note 256, at 228–31 (2d ed. 1921) (noting the edit to the Declaration and documenting Webster's bold break from Johnson's entrenched "u," among other bursts of iconoclasm).

²⁷³ Liebman & Ryan, *supra* note 14, at 723.

but Liebman and Ryan assume that the “judicial” power is held by Congress, arguing that the edit resulting in the verb “extend” replaced what had earlier been envisioned as mandatory jurisdiction “with a legislative power to authorize [judicial] review when appropriate.”²⁷⁴ That assumption is groundless. Providing that the judicial power extends to or reaches certain cases and controversies is not tantamount to granting legislative control over whether the judiciary may exercise the power.

Nicholas Rosenkranz is another scholar who has acknowledged the stability of the meaning of “extend.” He too, however, citing three eighteenth-century dictionaries, has adopted an inexplicably dynamic reading of the word: “The verb ‘to extend’ suggests today just what it signified in 1789: stretching, enlarging Thus, the scope of the judicial power— . . . unlike the scope of the legislative power—is not entirely fixed by the Constitution but may be stretched or enlarged by acts of Congress.”²⁷⁵ This puzzling conclusion, which Rosenkranz uses in service of a broader argument about the contrasting finiteness of Congress’s own power,²⁷⁶ imputes transformative ability to the definition of “extend.” No pile of dictionaries, though, can change “The judicial Power shall extend [or stretch or enlarge] . . .” into “Congress may extend [or stretch or enlarge] the judicial Power”

The vision of congressional control articulated by Rosenkranz differs in kind from the conventional one. As Congress enacts new statutes, he reasons, courts will be called on to interpret them, and thus in a certain quantitative sense, the scope of the judicial power to decide cases will grow.²⁷⁷ That point is true enough, as far as it goes; because some of the constitutionally assigned cases for federal courts to decide are those “arising under” federal laws, it is inevitable that Congress’s

²⁷⁴ *Id.*

²⁷⁵ Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1896 (2005) (contrasting judicial power with legislative power to critique the common understanding of the scope of Congress’s authority to enact bills implementing treaties) (citing N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (Edward Harwood ed., London, J.F. & C. Rivington et al., 25th ed. 1790); JOHNSON, *supra* note 169 (London, W. Strahan et al., 4th ed. 1773); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (John Andrews ed., Philadelphia, W. Youngs, Mills & Son, 6th ed. 1796)).

²⁷⁶ Rosenkranz makes his point about the Extension Clause not to advance an argument about Article III in particular but rather to support his thesis that Congress lacks authority to enact statutes implementing treaties whose subject matter falls outside the boundaries of the powers listed in Article I. See Rosenkranz, *supra* note 275, at 1868–69 (disagreeing with the result in the seminal case of *Missouri v. Holland*, 252 U.S. 416 (1920)).

²⁷⁷ Rosenkranz, *supra* note 275, at 1896 (“A new federal statute can give the judiciary something new to do, thus expanding its power.”).

pace of substantive (as opposed to jurisdictional) lawmaking, particularly when the laws include private rights of action, can stimulate courts' wielding of their authority.

The word "extend," however, contrary to Rosenkranz's assertion, has nothing to do with that unremarkable truth.²⁷⁸ Even if Article III provided that federal jurisdiction "shall be to hear and determine" the various cases and controversies, as an early draft did,²⁷⁹ Congress's substantive output would still affect the number of cases available for federal courts to decide, despite the lack of elasticity in the verbs "be," "hear," and "determine." Indeed, the same would be true if Article III echoed the straightforward language of Article I by providing that "[t]he [judiciary] shall have Power To" adjudicate the cases and controversies.²⁸⁰

²⁷⁸ See *id.* (attributing the elasticity of judicial power to long-standing definitions of "extend"). As a result, a foundation of Rosenkranz's overarching point about congressional power is shaky. Because of Article III's use of the word "extend," he maintains, the judiciary's power is not limited, whereas Article I's purportedly contrasting reference to the legislative powers "herein granted" shows that Congress's is. *Id.* at 1896–97. Those three modest words cannot bear the weight of that analysis, however. See *supra* note 106 (discussing the impact of a minor difference in the wording of the Vesting Clauses of Articles I and II). In the same marginal quantitative way that an enactment of a new substantive federal statute can expand the scope of the judiciary's power, so does, for example, an increase in the number of "foreign Nations" indirectly expand the legislative power (to regulate commerce with them), despite Article I's lack of an "[E]xtension" Clause *per se*. See U.S. CONST. art. I, § 8, cl. 3. In fact, the verb "extend" could readily coexist, in a sentence about power, with the descriptive phrase "herein granted." A hypothetical provision that "[t]he judicial Power *herein granted* shall extend to . . ." would hardly be oxymoronic, nor would the added words change the meaning of the actual Extension Clause. But cf. Rosenkranz, *supra* note 275, at 1897 ("[I]t would not have made sense to limit the federal courts to the powers 'herein granted,' because the scope of the judicial power may be expanded . . .").

Rosenkranz's contention that Congress lacks the authority to enact certain treaty-implementing statutes may have merit. See *id.* at 1868–69 (arguing that treaty obligations do not override constitutional limitations). But the legislative branch is not alone in having finite subject matter jurisdiction, as it were. See *id.* at 1878 (referring to the limited "subject matter" of congressional power). An Article III parallel would be that despite the putative malleability of the "extend"-able judicial power, federal courts could not be authorized to adjudicate, say, all cases (regardless of the identity of the parties or the nature of the dispute) in which the amount in controversy exceeds \$1 million.

In sum, the legislature and the judiciary are more alike than Rosenkranz admits. Congress can make as many laws as it likes (subject to presidential approval), and federal courts can decide as many cases as arise under those laws, but each branch has qualitative limits: Congress can make only certain kinds of laws, and the courts can decide only certain kinds of cases and controversies. The presence or absence of the word "extend" in the corresponding constitutional provisions is, on that score, immaterial.

²⁷⁹ 1 RECORDS, *supra* note 29, at 15 (May 29), 22 (Madison's notes); see *infra* notes 357–386 and accompanying text (discussing the edit in detail).

²⁸⁰ See U.S. CONST. art. I, § 8.

As for the conventional qualitative claim that cases and controversies falling within the nine listed categories are at the jurisdictional mercy of Congress—a claim not addressed one way or another by Rosenkranz—arguments based on the word “extend” are likewise unavailing. Substituting “stretch” or “enlarge,” as Rosenkranz does, is unobjectionable in and of itself, but whatever dictionary synonym one might plug into the Extension Clause, the legislature does not end up holding a direct on-off switch for the judicial power.

Another scholar to stretch the meaning of “extend” beyond its bounds is Julian Velasco. He has enlisted dictionaries from 1851 and 1993 in support of the orthodox view of congressional power over the jurisdiction of federal courts: “The word ‘extend’ is not unambiguous [T]he proper definition of the word ‘extend’ is a non-mandatory one, meaning ‘to reach.’ Thus, the relevant constitutional text is best paraphrased as follows: ‘The judicial power *hereby reaches* the following cases’”²⁸¹ As in Rosenkranz’s interpretation, and Liebman and Ryan’s, the synonyms are but a smokescreen. Whether one defines “extend” as “stretch” or “enlarge” or “reach” is of no moment.²⁸² Velasco’s sleight-of-hand, similar to that by Liebman and Ryan, is his characterization of the definition as “non-mandatory.” On its own, “extend” is inherently neither mandatory nor permissive. The mandatory, or at least inevitable, nature of the Extension Clause springs instead from the word “shall.”²⁸³

Still, Velasco’s paraphrase at the end of the above passage is fair; the judicial power does indeed “*reach*[.]” the listed cases and controversies. In elaborating further on the clause’s meaning, however, Velasco conjures up illusory flexibility, apparently from the supposed suppleness of “extend”: “Despite the self-executing ‘shall,’ the words ‘shall extend’ are more permissive than mandatory; they are better interpreted as ‘can include’ rather than as ‘must include.’”²⁸⁴ This conception of the judicial power as a reservoir that may or may not be tapped is all too common. Even Steven Calabresi, when endorsing a (partial) theory of mandatory federal jurisdiction based on his reading of “shall” as

²⁸¹ Velasco, *supra* note 14, at 703–04 (citing MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1075 (10th ed. 1993); WEBSTER, *supra* note 258, at 427 (Springfield, Mass., G. & C. Merriam 1851)).

²⁸² See *supra* note 269 (critiquing the distinction made by Calabresi and Rhodes between “reach” and “include” as potential senses of “extend”).

²⁸³ See *supra* notes 164–244 and accompanying text.

²⁸⁴ Velasco, *supra* note 14, at 704; see also *id.* at 716 (referring to “shall extend” as “descriptive”).

"must," managed to characterize "shall extend" as indicating "the maximum *potential* extent of federal judicial power."²⁸⁵

From that problematic premise, Velasco, making the same logical leap as Liebman and Ryan, concludes that the body with the power to tap this reservoir is Congress.²⁸⁶ That interpretation, he maintains, stems from a "natural reading of the text of the Constitution."²⁸⁷ With or without dictionaries, though, there is nothing "natural" about reading the Extension Clause—or, if one would prefer, the Stretching, Enlarging, or Reaching Clause—as turning the judicial power into a legislative one.

2. An Unwarrantable Connotation

When the prodigal protagonist of William Shakespeare's *Timon of Athens* boasted, "To Lacedaemon did my land extend," he was not speaking of a contingent interest.²⁸⁸ Later examples of its usage confirm that the verb "extend" did not apply to subjects that were inherently inchoate.

In fact, the extension of jurisdiction (if not "judicial power" per se) was a familiar linguistic construct to Americans in the constitutional era. The Declaration of Independence had used it in one of its defiant remonstrations: "We have warned [our British brethren] from time to time of attempts by their legislature to *extend* an unwarrantable *jurisdiction* over us."²⁸⁹ That grievance echoed a similar point from the Declaration and Resolves of the First Continental Congress two years earlier: "Whereas, . . . the British parliament . . . hath imposed rates and duties payable in these colonies . . . and *extended* the *jurisdiction* of courts of Admiralty not only for collecting the said duties, but for the trial of causes merely arising within the body of a county."²⁹⁰

In those revolutionary contexts, "extend" carried no evident connotation of potentiality. If extending jurisdiction had simply been a preliminary step clearing the way for some other body to decide later

²⁸⁵ Calabresi & Lawson, *supra* note 47, at 1014 (emphasis added).

²⁸⁶ See Velasco, *supra* note 14, at 704 & n.162 (assuming that it is up to Congress to decide the extent to which judicial power should be wielded).

²⁸⁷ *Id.* at 704.

²⁸⁸ See WILLIAM SHAKESPEARE, *TIMON OF ATHENS*, act 2, sc. 2, l. 145 (Karl Klein ed., Cambridge Univ. Press 2001) (1607). His previous line was "Let all my land be sold." *Id.* act 2, sc. 2, l. 139.

²⁸⁹ THE DECLARATION OF INDEPENDENCE (U.S. 1776) (emphasis added).

²⁹⁰ Declaration and Resolves of the First Continental Congress (Oct. 14, 1774) (emphasis added), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 82, 82 (Henry Steele Commager & Milton Cantor eds., 1988).

whether the extended jurisdiction could in fact be exercised, the colonial complaints would have lacked some of their bite.

Nor does anything in the Constitution suggest such a connotation. Of course, the document lacks a glossary as such,²⁹¹ but the way a word is used in one provision can help explain its meaning in another.²⁹² In its only other appearance in the unamended Constitution, the word “extend” is used in the negative, with language indicating a range. Section 3 of Article I provides that in cases of impeachment, judgment “shall not extend further than to” removal from one’s current office and disqualification from other offices.²⁹³ Echoing a similarly phrased provision from the Articles of Confederation, that sentence structure puts up a ceiling: no judgment may be more onerous than removal and disqualification, but nothing dictates such a double sanction in any given case.²⁹⁴

The clause about impeachment sanctions is not as far removed from the Extension Clause as one might think. The “shall not extend further than to” phrasing originated in James Wilson’s draft, for the Committee of Detail, of what became Article III;²⁹⁵ it was not until the end of the Convention that the Committee of Style moved it, intact, to Article I.²⁹⁶ Had Wilson and his fellow committee members wanted to engineer a ceiling in the Extension Clause similar to that in the clause about impeachment sanctions, they could have easily used the same comparative construction: “The judicial Power shall not extend further than to all Cases, in Law and Equity, arising under this Constitution” Or the same essential idea could have been phrased in the positive, with “shall extend up to”

²⁹¹ LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* 140 (1993) (critiquing the “theoretically incoherent body of law” that results when the Supreme Court interprets individual constitutional words across different cases).

²⁹² See Amar, *supra* note 192, at 748 (outlining this interpretive method); Calabresi & Rhodes, *supra* note 30, at 1216 (advocating a holistic interpretation under which parallel provisions in Articles II and III would be read in the same way).

²⁹³ U.S. CONST. art. I, § 3.

²⁹⁴ The only appearance of “extend” in the Articles of Confederation was also in the negative, with language indicating a range: “[R]estrictions [on trade and commerce by out-of-state citizens] shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant” ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1. The range described in the constitutional clause (“not . . . further than”) included the ceiling, whereas the range in the Articles of Confederation (“not . . . so far as”) did not, but each provision left leeway to determine the appropriate sanction or restriction.

²⁹⁵ 2 RECORDS, *supra* note 29, at 163 (Wilson draft for the Committee of Detail); see *id.* at 173 (showing emendation by John Rutledge).

²⁹⁶ *Id.* at 582 (Sept. 12), 590, 592 (report of the Committee of Style).

Under either of those formulations, one could have more sensibly (if not indisputably²⁹⁷) inferred an eventual need for precise demarcation within the constitutional range, though the identity of the appropriate power broker to pinpoint a new boundary would have been far from clear.²⁹⁸ Yet Wilson, his committee, and eventually the whole Convention stayed with “shall extend to” for the Extension Clause.²⁹⁹ By eschewing any language indicating a range, such as “not . . . further than” or “up to,” the delegates, instead of installing a ceiling, simply sealed in a fixed ambit of power for the judiciary.³⁰⁰

The Constitution was not the only momentous American document of 1787. One month to the day after delegates in Philadelphia introduced “extend” into the draft of what would become the Extension Clause,³⁰¹ the Continental Congress in New York enacted the Northwest Ordinance, which included a precursor to the Bill of Rights.³⁰² The prefatory language to the six enumerated rights described one of their purposes as “for *extending* the fundamental principles of civil and religious liberty” to the newly organized territory so that those principles would permeate its legal infrastructure.³⁰³ If “extending” principles was to give them force that was merely potential, subject to later unilateral policy judgments, the principles hardly could have been characterized as “fundamental.” In fact, the ordinance

²⁹⁷ To be sure, both “shall not extend further than to” and “shall extend up to” can be read as communicating fixed points rather than ranges, but those locutions, with their evocations of distance and height, convey a stronger suggestion of openness and room for movement than does the unadorned “shall extend to.”

²⁹⁸ Though the clause about judgment in cases of impeachment does not itself answer the question of who decides the sanction in a given case, the paragraph before it essentially does, by giving the Senate “the sole Power to try all Impeachments.” See U.S. CONST. art. I, § 3. In contrast, nothing in or near the Extension Clause specifies who is to superintend the putatively potential range of the judicial power. As to certain parts of the Extension Clause, Article III empowers Congress to make exceptions to the appellate form of the Supreme Court’s jurisdiction, as well as to regulate it, but neither of those prerogatives permits substantive restriction of the judicial power. See *generally* Glashausser, *supra* note 4 (arguing that the Exceptions Clause allows Congress to shift the Supreme Court’s jurisdiction from appellate to original).

²⁹⁹ See *infra* notes 326–399 and accompanying text.

³⁰⁰ Several years later, the Eleventh Amendment negated some of what the Extension Clause had conferred: “The Judicial power of the United States shall not be construed to extend to [certain suits].” See U.S. CONST. amend. XI. Because no phrase such as “further than” was used, the amendment set no ceiling; it simply razed part of the Extension Clause’s existing structure.

³⁰¹ 1 RECORDS, *supra* note 29, at 223 (June 13), 223–24 (journal), 231 (journal) (compilation of resolutions), 232 (Madison’s notes).

³⁰² See *generally* Northwest Ordinance of 1787, 1 Stat. 50, 52 (1789).

³⁰³ *Id.* § 13 (emphasis added).

stressed that, unless the existing states and people in the new territory both consented, the rights declared in furtherance of those principles would “forever remain unalterable.”³⁰⁴ The judicial power “extend[ed]” by the Constitution is no less permanent.

In modern legal writing, the word “extend” is likewise used in connection with unconditional norms. For example, the Federal Rules of Civil Procedure provide that an expert’s “duty to supplement extends both to information included in the [expert’s] report and to information given during the expert’s deposition.”³⁰⁵ Courts have not interpreted that duty as being dependent on any sort of triggering mechanism. Instead, it is simply the discovery of previously unknown information that gives rise to the duty.³⁰⁶

Congress routinely uses the phrase “shall extend” in self-executing laws. One of many mundane examples is a passage in Title 18 of the U.S. Code stating that “[t]he provisions of chapter 46 of this title relating to civil forfeitures . . . shall extend to any seizure or civil forfeiture under this section.”³⁰⁷ Congress has even used the phrase in a jurisdictional context: “The supervision and jurisdiction of the United States Capitol Police shall extend over [various areas in and around the Capitol].”³⁰⁸ Nothing in that statute suggests that discretionary implementation is necessary for the jurisdiction of the police to take effect, and no attempt has been made to restrict it. Yet when it comes to the jurisdiction of the Supreme Court, Congress (with the Court’s complicity) has blithely assumed a legislative prerogative to control the actual extent of the judiciary’s power.

3. An Imperfect Analogy

The jurisdiction of hypothetical police officers serves as the vehicle for an analogy by James Liebman and William Ryan that helps illuminate the meaning of “extend” in Article III. According to Liebman and Ryan, because the Constitution entrusts much of the enforcement of federal rights to state courts, the role of the federal judiciary is to “spot-

³⁰⁴ *Id.* § 14.

³⁰⁵ FED. R. CIV. P. 26(c)(2).

³⁰⁶ See, e.g., *Lewis v. FMC Corp.*, 786 F. Supp. 2d 690, 705 (W.D.N.Y. 2011) (“The duty to supplement arises when the expert subsequently learns of information that was previously unknown or unavailable . . .”); *In re San Juan Dupont Plaza Hotel Fire Litig.*, No. MDL-721, 1988 U.S. Dist. LEXIS 17332, at *138–39 (D.P.R. Dec. 2, 1988) (“Supplemental answers/reports must be filed as soon after the new evidence/opinion arises as possible.”).

³⁰⁷ 18 U.S.C.A. § 2320(b)(2) (West 2012).

³⁰⁸ Act of May 25, 1990, Pub. L. No. 101-302, § 313, 104 Stat. 213, 245.

check” the decisions of state judges, to the extent deemed appropriate by Congress.³⁰⁹ Thus defending the orthodox model of legislative control of the Supreme Court’s appellate jurisdiction, Liebman and Ryan argue that “[t]he Framers self-consciously swapped quantitative (jurisdictional) for qualitative (judicial power) protections of the federal courts.”³¹⁰ In their view, the “judicial Power” refers to the “authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law.”³¹¹ To “extend” that power to certain cases and controversies, they contend, is not to confer jurisdiction but simply to provide that when rendering decisions in such disputes, judges must abide by those qualitative prescriptions.³¹²

In an attempt to show that the Extension Clause permits legislative discretion about the quantitative extent to which judges may have the opportunity to wield the judicial power, Liebman and Ryan offer this analogy: “[C]onsider a police chief’s statement to line officers: ‘From now on, your exercise of the qualities of courtesy, professionalism, and respect shall extend to all off-duty athletic events, parties, professional conferences, and other social affairs.’”³¹³ The analogy matches the basic structure of the Extension Clause, as shown in the table below, and is a commendable effort to parse the clause by preserving its linguistic essence while removing its loaded legal context. It does not, however, reveal what the scholars intend.

[Y]our exercise of the qualities of courtesy, professionalism, and respect	shall extend to	all off-duty athletic events, parties, professional conferences, and other social affairs.
The judicial Power	shall extend to	all Cases [and Controversies of various sorts].

³⁰⁹ Liebman & Ryan, *supra* note 14, at 703.

³¹⁰ *Id.* at 702–03, 768–69, 775.

³¹¹ *Id.* at 771 (emphasis removed from original). More specifically, Liebman and Ryan describe a federal judicial power embracing five “qualitative attributes” that combine to both constrain and protect the adjudicative process: (1) independence, through life tenure and salary protection; (2) “insulation from self-consciously political decisionmaking” by separation of the judiciary from the other branches of government; (3) dissociation from state courts; (4) “the capacity to decide the whole case,” including both law and fact; and (5) “the obligation to decide cases on the basis of all pertinent federal law,” as a way of ensuring the supremacy of federal law. *Id.* at 769–70.

³¹² *Id.* at 753 (arguing that extending judicial power to certain cases serves not to guarantee that all such cases will be heard but “only to require that [federal courts] deploy the included judicial qualities when they do decide them”).

³¹³ *Id.* (brackets around “exercise of the qualities of” omitted).

Liebman and Ryan draw two conclusions from the analogy. One is unobjectionable on its face, though it does not support their thesis, whereas the other blurs a crucial distinction between responsibility and permission:

[T]his statement's . . . qualitative subject matter makes clear that it does not require officers to attend all, or any, athletic events, parties, or professional conferences, but only to behave themselves when they do. Likewise, to say that "federal courts' power to reach independent, comprehensive, final, and effectual decisions shall extend to all cases arising under the Constitution, laws, and treaties of the nation" is [1] not to require those courts to decide all such cases but [2] only to require that they deploy the included judicial qualities when they do decide them.³¹⁴

The scholars' first conclusion, that federal courts need not decide every case and controversy of the sorts listed, makes sense; the extension of a power to certain situations makes it available but does not compel its use.³¹⁵ The implication, however, that the Extension Clause thus does not grant federal courts "quantitative (jurisdictional)" protection is groundless. Interpreting the Extension Clause as a non-contingent jurisdictional grant would not "*require* [federal] courts to decide all such cases."³¹⁶ It would simply give courts the *authority* to do so.

More crucially, a similar conflation of duty and power corrupts the second conclusion—that what the Extension Clause does is impose a "qualitative" restriction on courts whenever they happen to adjudicate the listed cases and controversies. Liebman and Ryan write as though they were comparing two obligations, correlating the officers' "require[ment] . . . to behave themselves" with the putative "require[ment] that [courts] deploy the included judicial qualities."³¹⁷ The statement of the police chief indeed imposes a standard of conduct that must, in certain situations, be followed: a *duty* of decorum. In contrast, the constitutional clause by its terms sketches the scope of a "Power." As the two scholars note, the *duty* attaches whenever officers attend the listed events. The more logical implication of the parallel would therefore be

³¹⁴ *Id.*

³¹⁵ See *supra* text accompanying notes 40–43 (stressing the Supreme Court's lack of obligation to exercise its power in every case).

³¹⁶ See Liebman & Ryan, *supra* note 14, at 753 (emphasis added).

³¹⁷ *Id.*; see *supra* text accompanying note 314.

that whenever federal courts attend to the listed cases and controversies, their judicial *power* attaches.

Notably, neither attachment hinges on the approval of an outside entity. The police directive does not make the duty of decorum depend on implementation by the department; the directive itself creates the duty. Likewise, nothing in the Extension Clause conditions the judicial power on statutory authorization by Congress; the Constitution itself confers the power. The courts' power is thus as definitive as the officers' duty.

So a more comparable directive would be something like this: "Your police *power* (to flash a badge and make arrests and so on) shall extend to all off-duty athletic events, parties, professional conferences, and other social affairs." Just as the *duty* of decorum in Liebman and Ryan's example categorically applies in those situations, so would the police *power* in this adjusted hypothetical. Nothing in the provision suggests that officers need special permission to attend social events in the first place, or that once they are in attendance, a separate decision is needed to trigger their power. And so it is with the Constitution. Whatever inherent qualities and constraints the judicial power may have,³¹⁸ the Extension Clause implies no external activation process for it and contains nary a hint that before exercising jurisdiction in the listed cases and controversies, courts must first secure the substantive approval of the legislature.³¹⁹

Aside from the confusion over duty and power, Liebman and Ryan's interpretation is improbable in that it would seem to reduce the Extension Clause to a statement of the obvious. In their view, the clause serves to specify the method for adjudicating the listed cases and con-

³¹⁸ Liebman and Ryan may be correct in much of what they write about the judicial power's qualities, but if there is one quality inherent to such a power, it is jurisdiction. Theoretical power with respect to certain cases and controversies without the authority to issue binding decisions would be meaningless. Just as, in their police directive, the officers' ability to attend social events without receiving special permission is no less certain for being merely implicit, likewise courts' ability to exercise jurisdiction over cases and controversies as to which their "judicial Power" extends is unquestionable. See *supra* notes 94–95 and accompanying text (describing the interrelationship of judicial power and jurisdiction).

³¹⁹ Neutral logistical regulation would of course be appropriate. See *supra* note 35 and accompanying text. As for the police directive, it does not foreclose the possibility that another directive might create a condition. Likewise, one might argue that other constitutional language allows Congress to withhold appellate jurisdiction from the Supreme Court; indeed, many have advanced (albeit unconvincingly) such an interpretation of the Exceptions Clause. See Glashauser, *supra* note 4, at 1390–95 (discussing scholars' views). But the Extension Clause in and of itself cannot be read to contemplate such subservience for the judicial power.

troversies, namely, through the exercise of the judicial power.³²⁰ In a vacuum, perhaps the clause could be read with that qualitative parameter as its focal point.³²¹ But because in context there is no mystery about which power federal courts are to use—the judicial power is the only one vested in them—such a reading would make the clause unremarkable to the point of absurdity.

What the Extension Clause would fail to do under that reading is even more problematic: it would set no ceiling on the cases federal courts can hear. After all, mandating that police officers act professionally when attending off-duty social affairs does not bar them from spending free time alone or with their families.³²² And so requiring courts to “deploy the included judicial qualities” when deciding the listed cases and controversies would presumably not bar them from deciding unlisted ones. Do Liebman and Ryan believe that federal jurisdiction is infinite, and that the longest of Article III’s nine sentences is dedicated to providing that in a discrete set of disputes, adjudication must be faithful to the qualitative “judicial Power”?

They purport not to.³²³ But they cannot have it both ways. If the Extension Clause focuses, as they would have it, on prescribing *how* the listed cases and controversies are to be adjudicated,³²⁴ then it is a stretch to read into it a paradoxically secondary role of circumscribing *what* disputes may be adjudicated in the first place. More naturally, answering the *what* question is the primary—and in fact the only—function of the clause. All it does is sketch the judicial power’s scope, which by negative inference is limited to the listed disputes. Likewise, all the police directive seems to do is sketch the scope of the duty of decorum, which by negative inference is limited (outside of working hours) to the listed events.

³²⁰ See Liebman & Ryan, *supra* note 14, at 753 (“If the legislature were to tell federal courts to exercise something less than ‘the Judicial Power’ in cases within their jurisdiction, the courts would be required to ignore that directive because the Constitution . . . dictates that ‘the Judicial Power shall extend to’ those cases.”).

³²¹ See *id.* at 769–70 (detailing five “qualitative attributes of ‘the judicial Power’”).

³²² As Liebman and Ryan stress, their hypothetical directive creates no attendance requirement. *Id.* at 753.

³²³ *Id.* at 753–54 (“[I]f the legislature were to assign anything other than the listed ‘Cases’ and ‘Controversies’ to the ‘Supreme’ and ‘inferior’ courts, those courts would have to decline the assignment so as not to address a matter beyond that to which ‘shall extend’ (1) the only ‘Power’ Article III, Section 1 gives them and (2) the power by which they are defined.”).

³²⁴ See *id.* at 753 (arguing that the Extension Clause serves “only to require that [federal courts] deploy the included judicial qualities when they do decide” the listed cases and controversies).

Most importantly, even if the Extension Clause serves both purposes claimed by Liebman and Ryan—explaining both the *how* and the *what*—nothing in its language or in the scholars' analogy suggests the further counterintuitive gloss that the judicial power is a merely latent one that is to be superintended by the legislature. To be sure, Liebman and Ryan are correct in stating that the “judicial” nature of the federal courts' “Power” connotes certain qualitative attributes. But contrary to their claim, the Extension Clause in no way implies that those qualities come at the expense of “quantitative . . . protection” of jurisdiction.³²⁵

B. *An Extended Stay in Article III*

The drafting history of the Extension Clause shows the role of the word “extend” to be straightforward, without hidden meaning. Providing that jurisdiction would “extend” to certain cases and controversies was simply a more economical way of conveying that jurisdiction would “be to hear & determine” those disputes.

The weeks leading up to the appearance of “extend” saw a major storm, however, on the judicial front—a storm that sheds light on what the word does not mean. Unable to agree on whether the new national judiciary should include tribunals other than the Supreme Court, the delegates to the Federal Convention struck a delicate compromise that would explicitly save that question for Congress.³²⁶ The question of what cases and controversies the Supreme Court's jurisdiction should “extend” to was also the subject of significant debate.³²⁷ One draft of the Extension Clause suggested allowing Congress to decide some of that content,³²⁸ but that idea was quickly scotched, and the debate was resolved without resorting to the crutch of future legislative discretion.³²⁹ The delegates knew how to empower Congress with respect to the judiciary if they wanted to, and it was not by using the word “extend.” Once that word entered an early version of the clause, it remained, without amendment or discussion, through the final version of Article III.

³²⁵ See *id.* at 775 (supporting the orthodox view of congressional power over Supreme Court jurisdiction on the ground that “[t]he Framers self-consciously swapped quantitative (jurisdictional) for qualitative (judicial power) protections of the federal courts”).

³²⁶ See *infra* notes 330–356 and accompanying text.

³²⁷ See *infra* notes 362–368 and accompanying text (detailing the debate over the cases and controversies to which federal jurisdiction would apply).

³²⁸ See *infra* note 393 and accompanying text.

³²⁹ See *infra* note 397 and accompanying text.

1. From the Virginia Plan to the Madisonian Compromise

As discussed above, the Virginia Plan kicking off the Federal Convention in May 1787 included a resolution about a “National Judiciary.”³³⁰ According to the most widely accepted source, the resolution conceived of “one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature”;³³¹ according to an alternative credible source, the resolution was silent about the hierarchy or structure of any court system, referring only to an undifferentiated judiciary.³³² What is certain is that the resolution provided that the “jurisdiction” of the national courts “shall be to hear & determine” various types of disputes.³³³

The word “extend” would not appear until two weeks later, after much heated discussion about the contours of the judicial branch and the resulting “Madisonian compromise.”³³⁴ But that discussion provides crucial context for understanding the eventual switch from the “hear & determine” construction to “extend.” And most directly, it shows that had the delegates wanted to open the determination of the Supreme Court’s jurisdiction to the legislature, they knew how to do so without resorting to a putative crevice in a solid word like “extend.”

On June 4, the delegates amended the Virginia Plan’s resolution so that the judiciary would “consist of One supreme tribunal, and of one or more inferior tribunals.”³³⁵ The next day, after the phrase “one

³³⁰ See *supra* notes 128–163 and accompanying text.

³³¹ See 1 RECORDS, *supra* note 29, at 15 (May 29), 21–22 (Madison’s notes).

³³² JAMESON, *supra* note 132, at 106.

³³³ Compare *id.* (“[The National Judiciary’s] jurisdiction shall be to hear and determine [the various types of disputes].”), with 1 RECORDS, *supra* note 29, at 15 (May 29), 21–22 (Madison’s notes) (“[T]he jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort [the various types of disputes].”).

³³⁴ See *infra* notes 357–386 and accompanying text.

³³⁵ 1 RECORDS, *supra* note 29, at 93 (June 4), 95 (journal), 104–05 (Madison’s notes). Depending on the original language of the plan, that change either eliminated the possibility of multiple supreme courts or added wholly new language about the structure of the court system. Compare JAMESON, *supra* note 132, at 103–06 (noting that both the official journal and Madison’s notes recorded the motion as being one to “add” language to the resolution), with 3 RECORDS, *supra* note 29, at app. C, 594 (acknowledging uncertainty). Scholars have assumed that the change eliminated that possibility. See Engdahl, *supra* note 142, at 465 (calling that decision “the first of several parliamentary steps by the delegates who maintained that all litigation should begin (and ordinarily end) in *state* courts, with only a single national tribunal to review certain classes of cases”); Liebman & Ryan, *supra* note 14, at 715 (noting that the decision to have but a single supreme court “commenc[ed] a trend towards diminished federal judicial capacity” that continued with the attempts to eliminate inferior courts).

or more” was struck,³³⁶ John Rutledge of South Carolina, who advocated for a relatively weak national government,³³⁷ moved to strike the reference to inferior tribunals altogether, so as to leave the judiciary consisting only of the single supreme tribunal.³³⁸ State courts, Rutledge argued, should hear all cases originally; the appellate jurisdiction of the supreme tribunal would suffice “to secure the national rights & uniformity of Judgmts.”³³⁹ Inferior courts, he worried, would encroach on state courts’ jurisdiction and thus pose “unnecessary obstacles” to the approval of the Constitution.³⁴⁰

Fighting for a robust federal judiciary, James Madison countered with a broadside against Rutledge’s position. From a practical perspective, Madison raised the specter of a flood of litigation that would overwhelm the single supreme tribunal if it were the only federal court.³⁴¹

³³⁶ 1 RECORDS, *supra* note 29, at 115 (June 5), 116 (journal) (including, in an apparent error, the word “to” between “inferior” and “tribunals”), 119 (Madison’s notes). James Wilson then noted that he would later ask for reconsideration of the issue of inferior tribunals. *Id.* at 115 (June 5), 116 (journal), 120 (Madison’s notes). Further consideration of the resolution was postponed, perhaps because of uncertainty about the status of inferior courts. *See id.* at 115 (June 5), 116 (journal), 121 (Madison’s notes).

³³⁷ DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 167 (2007).

³³⁸ *See* SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787*, at 35 (2011) (observing that the debate centered more on federalism than on separation of powers).

³³⁹ 1 RECORDS, *supra* note 29, at 115 (June 5), 124 (Madison’s notes).

³⁴⁰ *Id.*

³⁴¹ *Id.* In that vein, Madison commented that the supreme tribunal would be flooded unless inferior tribunals had “*final* juri[sd]iction in *many* cases.” *Id.* David Engdahl has taken Madison’s comment to mean that the eventual compromise was based on the notion that the Supreme Court could be divested of jurisdiction in favor of inferior courts; being “supreme” did not imply a hierarchy in which it would have the last word, but instead signaled simply that, unlike the regional inferior courts, its jurisdiction would be nationwide. Engdahl, *supra* note 94, at 155 (arguing that one goal of the Madisonian compromise was to prevent the need to travel to Washington for appeals and that Congress could not have achieved that goal without putative power to deprive the Supreme Court of jurisdiction); Engdahl, *supra* note 142, at 473–77, 491 (“Congress would be trusted, should it create other courts, to weigh against the benefits of speedier and less costly dispute resolution the possible inconvenience of inconsistent, yet unreviewable, ‘*final*’ judgments ‘in *many* cases’ by collateral, rather than hierarchical, federal tribunals.”); *see also* William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an “Essential Role,”* 100 YALE L.J. 1013, 1016 & n.16 (1991) (interpreting Madison’s comment as a suggestion that litigants in inferior federal courts could be “without recourse to the Supreme Court”).

The mere possibility of a further appeal to the Supreme Court, however, would not stop the decisions of inferior courts from, in many cases, being “final.” Indeed, most federal appeals today are final at the circuit court level, not in possibility but in fact. The ability to appeal cases from state courts to regional federal courts, or to initiate cases in regional federal courts, would solve the logistical problem Madison raised, regardless of whether a further hearing before the Supreme Court was available. *See infra* note 354 (dis-

The geographic dispersal of inferior tribunals, he argued, was essential to ensuring the feasibility of taking a case to federal court.³⁴² His ally, Pennsylvania's James Wilson, added that certain cases were not suited for state courts at all.³⁴³ Madison worried less about encroaching on state courts' jurisdiction than about those courts' encroachments on people's rights. Judges without the independence that the Constitution would provide might be "biassed," and state juries could view cases through "local prejudices," leading to "improper Verdicts."³⁴⁴

Madison's other appeal for inferior tribunals was more abstract and sweeping. In his vision of the anatomy of the new system, the different branches needed to fit together properly to provide balance. It was essential, he insisted, that the judiciary be "commensurate to the legislative authority."³⁴⁵ Eliminating inferior federal tribunals would stunt the judiciary and, by extension, the nation: "A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move."³⁴⁶ Connecticut's Roger Sherman, however, was more concerned with the crippling expense he saw in the proliferation of federal courts. Why pay for new courts, he asked, when the existing state courts could do the job?³⁴⁷

With the two sides' positions clear, Delaware's John Dickinson echoed Madison's point about interbranch congruity but edged toward a compromise. "[I]f there was to be a National Legislature," he rea-

curring Rufus King's comment that the establishment of inferior courts would "prevent[]" many appeals). Though "final" can, as Engdahl writes, mean "unreviewable," Engdahl, *supra* note 142, at 476, it can also mean "unreviewed." Cf. Claus, *One Court*, *supra* note 47, at 116–18 (interpreting Madison's comment to mean that he contemplated legislative power to restrict the Supreme Court's appellate jurisdiction by "adjudicative stakes" if not by "issue," yet entertaining the possibility that Madison envisioned discretionary review power in the Supreme Court over nominally "*final*" judgments of inferior courts).

Of course, Madison's view of what language would accomplish is not the constitutional touchstone. See STEWART, *supra* note 337, at 105 (dismantling the notion that Madison's vision prevailed throughout the constitutional debates). In any event, Madison probably was anticipating that many litigants would seek a federal forum. If no inferior federal courts existed, those litigants would have no choice but to start in state courts (unless original jurisdiction in the Supreme Court was available) and eventually appeal, in great numbers, to the national Supreme Court. If they could bring their cases to regional federal courts, however, then few would likely pursue a later appeal in the single—and prohibitively distant, for most—Supreme Court. Hence the judgments of the inferior courts would generally be unreviewed, and their jurisdiction thus final.

³⁴² 1 RECORDS, *supra* note 29, at 115 (June 5), 124 (Madison's notes).

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 115 (June 5), 125 (Madison's notes).

soned, "there ought to be a national Judiciary . . .," and the legislature should be empowered to "institute" courts.³⁴⁸ Still, Rutledge's pending motion posed a stark choice: the judiciary would consist of either the supreme tribunal and inferior ones, or only the supreme one. And by a 5-4 vote, with two state delegations divided, the motion to eliminate the inferior courts passed.³⁴⁹

By the slimmest plurality, the judiciary seemed destined to be but a single court. Perhaps the closeness of the vote inspired Madison and Wilson to try another tack. Evoking Dickinson's earlier suggestion, they moved to adopt a provision empowering the legislature to "appoint"³⁵⁰ or "institute"³⁵¹ inferior tribunals. They stressed the distinction between legislative discretion and a constitutional mandate.³⁵²

Pierce Butler, Rutledge's South Carolina colleague, was unswayed. He protested that even if preserving the possibility of inferior courts made some theoretical sense, as a practical matter, the states would "revolt at such encroachments."³⁵³ But Rufus King of Massachusetts lauded the practicality of the compromise. Like Madison, he worried that a multitude of appeals would overwhelm the supreme tribunal were it the only federal court.³⁵⁴ King's delegation, which had been di-

³⁴⁸ 1 RECORDS, *supra* note 29, at 115 (June 5), 125 (Madison's notes). It is possible that Madison himself may have made that point as well; Rufus King recorded in his notes that "Madison proposes to vest the Genl. Govt. with authority to erect an Independent Judicial, coextensive wt. ye. Nation." *Id.* at 115 (June 5), 128 (King's notes). King's notes are spotty, however, and it seems more likely that King was confusing this with the later motion.

³⁴⁹ *Id.* at 115 (June 5), 118 (journal), 125 (Madison's notes). New Jersey, North Carolina, and Georgia joined Connecticut and South Carolina in supporting Rutledge's motion. *Id.* Dickinson's Delaware cast its vote with Virginia and Pennsylvania, as did Maryland. *Id.* With the remaining two delegations (Massachusetts and New York) divided, the five ayes prevailed. *Id.*

³⁵⁰ See *id.* at 115 (June 5), 118 (journal), 127 (Yates's notes) (reporting that Wilson presented the motion).

³⁵¹ See *id.* at 115 (June 5), 125 (Madison's notes) (reporting that Wilson and Madison presented the motion).

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ See 1 RECORDS, *supra* note 29, at 115 (June 5), 125 (Madison's notes). King predicted that the establishment of inferior tribunals would "prevent[]" many appeals and thus be less expensive than the alternative. *Id.* He presumably shared Madison's hope that inferior tribunals would exercise "*final* juri[sd]iction in *many* cases." See *id.* at 124 (Madison's notes). As discussed above, Madison—and by extension King—likely supposed that inferior tribunals would satisfy most litigants' desire for a federal forum. See *supra* note 341 (considering the import of Madison's comment). The relative "expence" feared by King is less transparent. See *id.* at 125 (Madison's notes). Perhaps it was the government's need to pay multiple judges for each case before the supreme (but not an inferior) court. Or perhaps King considered the parties' perspective: "By creating inferior federal courts, Congress ensured litigants less costly access to Article III courts." Evan H. Caminker, *Why Must*

vided, cast its lot with Madison and Wilson, who also converted two other states to their side.³⁵⁵ Thus was struck the “Madisonian”—though perhaps it should be “Dickinsonian”³⁵⁶—compromise.

The delegates had solved a seemingly intractable problem by, in essence, not solving it at all but instead leaving it open to future political determination. They had done so by explicitly invoking the legislature and describing what it could do to shape the judiciary. No resort was made to the word that, in the eyes of many scholars today, implicitly allows similar control: “extend.”

2. From “Hear . . .” to “Extend”

A week after the Madisonian or Dickinsonian compromise, the resolution about the judiciary returned to the Convention’s floor.³⁵⁷ The compromise would not be revisited, but the battle was surely fresh in the delegates’ minds, and lingering issues remained. The legislature’s power to “appoint” or “institute” inferior courts was in place, but it was unclear what ripple effect the compromise might have on the description of federal jurisdiction. Moreover, aside from the question of what court or courts would exercise it, the substantive content of that jurisdiction was far from settled. Amid the ensuing edits would enter, quietly, the word “extend.”

First came a motion to amend the resolution to read, in part, that “the jurisdiction of the supreme Tribunal shall be to hear and determine in the dernier resort all piracies, felonies &ca.”³⁵⁸ Based on the account of the original Virginia Plan in the most widely accepted historical source, that amendment would have eliminated the reference to the jurisdiction of inferior courts.³⁵⁹ The reference to such courts as part of the national judiciary had already been struck in favor of the

Inferior Courts Obey Superior Court Precedents?, 46 STAN. L. REV. 817, 833 & n.68 (1994) (citing Madison’s comment about “final jur[is]diction”).

³⁵⁵ 1 RECORDS, *supra* note 29, at 115 (June 5), 118–19 (journal) (recording the margin as 7–3, with Georgia and North Carolina having switched sides), 127 (Yates’s notes). Madison recorded that New Jersey switched sides as well. *Id.* at 115 (June 5), 125 (Madison’s notes) (recording the margin as 8–2).

³⁵⁶ One scholar has highlighted Wilson’s role by referring to the “Madison-Wilson compromise.” Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 IOWA L. REV. 891, 902 (1990) (referring to the usual label as “one-sided[.]”). As the apparent intermediary between the nationalists and the protectors of state judiciaries, however, Dickinson may deserve more credit.

³⁵⁷ 1 RECORDS, *supra* note 29, at 209 (June 12), 211 (journal), 220 (Madison’s notes).

³⁵⁸ *Id.*

³⁵⁹ See *supra* notes 335–349 and accompanying text.

provision empowering Congress to establish inferior courts,³⁶⁰ but still intact was the jurisdictional provision: “[T]he jurisdiction of the inferior tribunals shall be to hear & determine in the first instance”³⁶¹ Based on an alternative historical source, according to which the original plan did not refer to the jurisdiction or even existence of inferior courts, or to any allocation of jurisdictional form,³⁶² the amendment sought merely to establish that the Supreme Court’s jurisdiction would take the appellate form; perhaps pointedly, it omitted any reference to potential inferior courts. The motion was not voted on.³⁶³

The Convention then made several adjustments to the substance of federal jurisdiction. The Virginia Plan included an ambitious list of six categories of disputes to be heard by the national judiciary, including the open-ended “questions which may involve the national peace and harmony.”³⁶⁴ Though details are unavailable, apparently some delegates found the list too inclusive. The category of “all piracies & felonies on the high seas” was deleted, as was that of “all captures from an enemy.”³⁶⁵ The murky early sketch of diversity jurisdiction, for “cases in which foreigners or citizens of other States applying to such jurisdictions may be interested,”³⁶⁶ was clarified a bit by replacing “other States” with “two distinct States in the union.”³⁶⁷

The next day, the whole provision on jurisdiction was temporarily struck to allow a blank slate.³⁶⁸ Responding to the ominous developments, Randolph and Madison then made a move to strengthen the hand of the Federalists. The previous day’s still-pending motion posed a risk by proposing a jurisdictional resolution without any reference to the possibility of inferior courts. If the jurisdiction described in the Constitution applied by its explicit terms only to the Supreme Court,

³⁶⁰ See *supra* notes 335–349 and accompanying text.

³⁶¹ 1 RECORDS, *supra* note 29, at 15 (May 29), 22 (Madison’s notes).

³⁶² JAMESON, *supra* note 132, at 106.

³⁶³ 1 RECORDS, *supra* note 29, at 209 (June 12), 211–12 (journal), 220 (Madison’s notes).

³⁶⁴ See *id.* at 15 (May 29), 21–22 (Madison’s notes); JAMESON, *supra* note 132, at 106.

³⁶⁵ 1 RECORDS, *supra* note 29, at 209 (June 12), 211 (journal), 220 (Madison’s notes) (Randolph plan). Those categories represented the substantive jurisdiction authorized under the Articles of Confederation. See *supra* notes 25–27 and accompanying text (summarizing the pre-constitutional national courts).

³⁶⁶ See 1 RECORDS, *supra* note 29, at 15 (May 29), 22 (Madison’s notes); JAMESON, *supra* note 132, at 106. That category was apparently the seed of diversity jurisdiction; New Jersey’s William Paterson described it as “Disputes between Foreigners and Citizens, and the Citizen of one State and that of another.” See 1 RECORDS, *supra* note 29, at 15 (May 29), 28 (Paterson’s notes).

³⁶⁷ See *id.*, at 209 (June 12), 211 (journal), 220 (Madison’s notes) (using the phrase “two distinct States of the Union”).

³⁶⁸ *Id.* at 223 (June 13), 232 (Madison’s notes).

inferior courts might appear to be a constitutional afterthought. In the face of that risk, Randolph and Madison deftly advanced another, more modest, compromise.

Defining the jurisdiction of any named courts *per se* could have upset the balance wrought by the Madisonian compromise by either specifically including or conspicuously omitting inferior courts. Instead, Randolph and Madison's proposal reflected the substantive deletions of the previous day, did away additionally with diversity jurisdiction, and referred to the jurisdiction of the judicial branch holistically: "That the jurisdiction of the national Judiciary shall *extend* to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony."³⁶⁹

Inferior courts were not unnecessarily highlighted, but their potential jurisdiction was covered.³⁷⁰ Another bulwark for the judiciary was that, unlike the previous day's pending motion, Randolph and Madison's proposal declined to box the Supreme Court into appellate ("dernier resort") jurisdiction; that omission left the door open to creating a floor of original jurisdiction in the Supreme Court, as Randolph would do in his later draft for the Committee of Detail.³⁷¹

The only recorded statement about the merits of Randolph and Madison's jurisdictional proposal was by Randolph, who referred to the previous day's "difficulty" in defining the "powers of the judiciary."³⁷² He downplayed that problem, stressing that a committee would later work out the details (and, in fact, he ended up on the Committee of

³⁶⁹ *Id.* at 223 (June 13), 223–24 (journal) (emphasis added), 231 (journal) (compilation of resolutions), 232 (Madison's notes) (emphasis added); *see also id.* at 237 (June 13), 237 (Madison's notes of the compilation) (prefacing "cases" with "all"), 238 (Yates's notes) (prefacing "cases" with "all"). That holistic approach to jurisdiction echoed the provision, in the alternative historical source's version of the Virginia Plan, that set out the jurisdiction of the "national judiciary." *See* JAMESON, *supra* note 132, at 106 ("[I]ts jurisdiction shall be to hear and determine [various disputes].").

³⁷⁰ The Committee of Detail would later draft a provision specifying that the legislature could "assign" the Supreme Court's jurisdiction to inferior courts; that provision was eventually deleted in conjunction with the switch from "jurisdiction of the Supreme Court" to "Judicial Power." *See supra* notes 140–142 and accompanying text (discussing the drafting and eventual deletion of the assignment clause).

³⁷¹ *See* 4 RECORDS, *supra* note 29, at 37, 48 (Randolph draft); *see also* 2 *id.* at 137, 147 (Randolph draft); Liebman & Ryan, *supra* note 14, at 722 (noting this effect).

³⁷² 1 RECORDS, *supra* note 29, at 223 (June 13), 238 (Yates's notes). He appeared to be referring to jurisdiction, thus suggesting that he viewed jurisdiction and judicial powers to be roughly synonymous.

Detail a month later).³⁷³ Randolph's exhortations calmed the storm, and the proposal passed unanimously.³⁷⁴

And thus "extend" made its Extension Clause debut. There was no recorded discussion of the word *per se*, nor was there any indication that Randolph or Madison—or any other delegate—intended the word to undermine the vision of a vigorous judiciary by injecting a stealth layer of congressional control over federal jurisdiction.³⁷⁵

Instead of using "extend," Randolph and Madison could have kept the existing phrase, providing that jurisdiction "shall be to hear & determine" the three sets of cases. The "hear & determine" wording was common, having appeared in an oath set out in the Articles of Confederation.³⁷⁶ It had been in usage in American law since at least 1636, when a court in Massachusetts Bay proclaimed that magistrates would "heare & determine all causes according to the lawes nowe established, & where there is noe law, then as neere the lawe of God as they can."³⁷⁷ Once the Virginians were shortening the list of cases and rewriting the provision, though, they apparently took the opportunity to streamline it by substituting "extend to." After all, "jurisdiction" would itself convey

³⁷³ *Id.* Randolph stressed that the aim of the proposal was simply to ensure "the security of foreigners where treaties are in their favor, and to preserve the harmony of states and that of the citizens thereof." *Id.* In order to focus on those basic goals, Randolph announced that he would "obliterate" the rest of the existing resolution. *Id.* That rhetoric (as recorded by Robert Yates) was somewhat overblown, as the provisions of the Madisonian compromise were safe in separate resolutions. *See id.* at 223 (June 13), 236–37 (Madison's notes). In light of the successful motions the day before to eliminate the references to piracies, felonies, and captures, the only substantive aspect of the resolution being obliterated was the diversity category; perhaps Randolph had sensed resistance or at least confusion in the previous day's motion to change that language. *Cf.* GOEBEL, *supra* note 195, at 216 (surmising that "something sufficiently disturbing had occurred" to cause Randolph to omit several jurisdictional categories from his amended resolution).

³⁷⁴ 1 RECORDS, *supra* note 29, at 223 (June 13), 238 (Yates's notes).

³⁷⁵ *See id.*

³⁷⁶ *See* ARTICLES OF CONFEDERATION of 1781 art. IX, para. 2.

³⁷⁷ 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 174–75 (Nathaniel B. Shurtleff ed., Boston, William White 1853) (recording the proceedings of May 25, 1636). John Adams claimed that the Massachusetts Constitution, enacted in 1780, formed the essential basis for the federal one and that his writings about his state's document broke a logjam in Philadelphia at the Federal Convention. Letter from John Adams to William D. Williamson (Feb. 25, 1812), *microformed on* 2 THE ADAMS PAPERS, *supra* note 254, at reel 118, no. 244. His take may be overstated, but the Massachusetts Constitution did use the same phrase. *See* MASS. CONST. pt. II, ch. III, art. V (providing for certain cases to be "heard & determined" by the governor and a council); *see also* R.I. AND PROVIDENCE PLANTATIONS' ROYAL CHARTER of 1663 (granting the General Assembly authority "to apoynt . . . courts of jurisdiction, for the heareinge and determininge of all actions, cases, matters and things, . . . as they shall thinke fit"); 1 BLACKSTONE, *supra* note 29, at *354 (noting the authority of judges "to hear and determine all felonies").

the power to “hear & determine.” With two minor exceptions, that serial verb phrase never reappeared in the drafts of the Constitution.³⁷⁸

The hypothesis that stylistic elegance motivated this minor edit is somewhat speculative, but Randolph and Madison’s choice of the verb “extend” to follow the subject “jurisdiction” was thoroughly unremarkable. As discussed above, revolutionary tracts of the previous decade had fulminated against Britain’s overzealous “exten[sion]” of “jurisdiction.”³⁷⁹ Georgia’s Constitution of 1777 had used that same formulation, providing “[t]hat the court of conscience [for small debts] be continued . . . and that the jurisdiction thereof be extended to try causes not amounting to more than ten pounds.”³⁸⁰ Case law too had discussed jurisdiction in terms of its “extent”—simply to describe its scope, not to convey that it was subject to legislative approval.³⁸¹

Moreover, at the Federal Convention, consideration of the legislative power often had been framed in terms of how far it should “extend.”³⁸² For example, five days earlier, in a debate about whether the

³⁷⁸ One exception was in the parallel New Jersey Plan brought forward two days later, which had taken that phrase as well as others from the jurisdictional section of the Randolph plan. 1 RECORDS, *supra* note 29, at 241 (June 15), 244 (Madison’s notes) (New Jersey Plan). The other was in an oath (as part of a procedure lifted from the Articles of Confederation) that was eventually eliminated. 2 *id.* at 159, 162, 170–71 (Committee of Detail documents); *id.* at 176 (Aug. 6), 184 (Madison’s notes) (Committee of Detail draft presented to the Convention after adjournment).

³⁷⁹ See *supra* text accompanying notes 289–290.

³⁸⁰ GA. CONST. of 1777, art. XLVI; see also 3 BLACKSTONE, *supra* note 29, at *85 (discussing how far courts’ limited “jurisdiction” can be “extended”); DAINES BARRINGTON, OBSERVATIONS ON THE STATUTES 247–48 (London, W. Bowyer & J. Nichols 1766) (noting the prevalence during the reign of King Henry IV of trusts that “courts of common law either could not reach, or were unwilling to extend their jurisdiction to”).

³⁸¹ For example, when refusing to exercise its jurisdiction on a writ of certiorari, the Court of Appeals of Maryland noted that courts should use caution in “extending their jurisdiction.” *Maryland v. Johnston*, 2 H. & McH. 160, 166 (Md. 1786). Likewise, in a decision about whether the Court of Admiralty for Pennsylvania had jurisdiction over a dispute, the state’s High Court of Errors and Appeals considered the “extent of . . . jurisdiction” of a parallel court in England. *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95, 106 (unnumbered footnote) (Pa. 1784). In fact, in a case before the Virginia Supreme Court, Edmund Randolph’s father, the attorney general, had argued that the legislature had not intended to “extend” the court’s jurisdiction to include the instant case. *Godwin v. Lunan*, 1771 Va. LEXIS 1, at *29 (Oct. 1771) (no docket number).

³⁸² *E.g.*, 1 RECORDS, *supra* note 29, at 45 (May 31), 60 (Pierce’s notes) (noting Randolph’s comment about how far legislative power “ought to extend”); see also *id.* at 62 (June 1), 64–65 (Madison’s notes) (noting Charles Pinckney’s fear that the executive powers of the Continental Congress “might extend to peace & war”). Such comments continued later as well. *E.g.*, *id.* at 460 (June 29), 470 (Madison’s notes) (noting a comment by Abraham Baldwin of Georgia about whether the national legislature would “extend its cares” to state matters); 2 *id.* at 312 (Aug. 17), 315 (Madison’s notes) (noting Gouverneur Morris’s comment that “it would be necessary to extend the [legislature’s] authority farther”); 2 *id.* at 544 (Sept. 8), 550

national legislature should have the power to invalidate improper state laws, Elbridge Gerry of Massachusetts had suggested that such power "ought to extend to all laws already made."³⁸³ A fervent supporter of the congressional "negative," Madison agreed that the power to negate should be expansive; it should not be limited to certain types of state laws but rather "must extend to all cases."³⁸⁴ Gerry and Madison could not have implied that some superseding power would curtail the national legislature's ability to nullify state laws. Likewise, nothing suggests that when the delegates decided that the Supreme Court's "jurisdiction"—and later the national "judicial Power"—"shall extend to all Cases . . .," they intended to curtail the authority of federal courts.

The congressional negative, of course, did not survive. Nor did the eventual list of legislative powers end up using the word "extend." But that lexical distinction between the legislative and judiciary articles implies no substantive difference. In listing the legislative powers, Article I uses the formulation "Congress shall have Power To . . ."³⁸⁵ It would have been awkward and unnecessary to write "Congress's Power shall extend to" while tacking "—ing" onto all the verbs. Conversely, the provision about the judiciary's "Power" began as one about the Supreme Court's "jurisdiction," making "extend" a natural choice for Article III.

(Madison's notes) (noting George Mason's comment that it was "necessary to extend: the power of impeachments"); 2 *id.* at 621 (Sept. 15), 640 (Mason's notes) (noting his complaint about how far legislators would be able to "extend their powers").

It is also possible that Randolph and Madison may have been influenced by the constitutional plan submitted by South Carolina's Charles Pinckney on May 29. Though the original was lost, Pinckney later gave a version to John Quincy Adams, claiming it to be the true original, so that Adams could publish it with the Convention records. That version provided that the Supreme Court's "Jurisdiction shall extend to all cases . . ." 1 RECORDS, *supra* note 29, at 15 (May 29), 16 (journal), 23 (Madison's notes) (referring to the presentation of Pinckney's plan); 3 *id.* at app. D, 595, 600 (Pinckney plan). But Max Farrand, with good reason, doubted the authenticity of that version, suggesting that it referred anachronistically to the draft later prepared by the Committee of Detail. *See* 3 *id.* at 602–04. In a reconstructed version Farrand viewed as the closest possible rendering of Pinckney's actual plan of May 29, the analogous language provided that appeals to the Supreme Court "shall be allowed" in certain cases. 3 *id.* at app. D, 604, 608 (reconstructed Pinckney plan); *see also* BEEMAN, *supra* note 131, at 97–98 (calling Pinckney's claim to Adams "simply untrue"). Likewise, the outline of the Pinckney plan found with the papers of the Committee of Detail did not use that phrase. 2 RECORDS, *supra* note 29, at 134, 136 (outline of Pinckney plan). In sum, it seems unlikely that Madison and Randolph got the phrase from Pinckney—whom Madison thought to be a shameless self-promoter. *See* BEEMAN, *supra* note 131, at 93–98 (summarizing the debate about credit deserved by Pinckney).

³⁸³ *E.g.*, 1 RECORDS, *supra* note 29, at 162 (June 8), 170 (Yates's notes).

³⁸⁴ *Id.* at 162 (June 8), 164–65 (Madison's notes).

³⁸⁵ U.S. CONST. art. I, § 8.

When “jurisdiction” changed to “Judicial Power,”³⁸⁶ there was no reason to upend that phrasing; the sentence read just as well with the new subject.

In retrospect, one might question why the delegates did not reconstruct the sentence to forge a more precise parallel with the article about the legislature, such as, “The judiciary shall have Power to hear and determine” Though wordier, that language would have prevented confusion about whether “extend” connotes a legislative power. But such a misunderstanding was unforeseeable; nobody worried that the extension of the judicial power might be construed as a grant of a legislative one. In any event, without fanfare, “extend” was in Article III to stay.

3. From Edmund Randolph's Draft to James Wilson's Draft

As the Convention continued through various drafts and amendments, the word “extend” stayed in place. Other language, however, came and went. Perhaps the most compelling evidence that the final version of the Extension Clause does not confer discretion on the legislature to control the Supreme Court's jurisdiction is that in a midsummer draft, it did.

Edmund Randolph was part of the five-man Committee of Detail charged with compiling a working draft of the Constitution at the end of July.³⁸⁷ The first available draft was written in his hand.³⁸⁸ Its rendering of the Extension Clause began familiarly: “The jurisdiction of the supreme tribunal shall extend . . . to all cases, arising under laws passed by the general Legislature”³⁸⁹ The second jurisdictional category covered impeachments.³⁹⁰ That was a brazen move in that just the week before, the Convention had voted to eliminate that sensitive area from the judiciary's purview.³⁹¹ But Randolph was passionate about the need

³⁸⁶ See *supra* notes 138–163 and accompanying text (chronicling the August 27 shift).

³⁸⁷ See *supra* note 136 (introducing the Committee of Detail).

³⁸⁸ The Randolph draft was “undoubtedly a rough draft used” by the Committee of Detail. WILLIAM M. MEIGS, *THE GROWTH OF THE CONSTITUTION IN THE FEDERAL CONVENTION OF 1787*, at 21 (photo. reprint 1987) (1900). As with the Virginia Plan, it is unclear to what extent Randolph himself formulated the ideas expressed by his hand. See STEWART, *supra* note 337, at 168–69 (speculating that the draft was a “joint product” of the committee, by way of outline to set down initial thoughts).

³⁸⁹ 4 RECORDS, *supra* note 29, at 37, 47–48 (Randolph draft); see also 2 *id.* at 137, 146 (Randolph draft). The word “Legislature” was written by John Rutledge. See *id.* at 137 n.6, 146 (noting emendations by Rutledge).

³⁹⁰ 4 *id.* at 37, 47–48 (Randolph draft); see also 2 *id.* at 137, 146–47 (Randolph draft).

³⁹¹ See 2 *id.* at 37 (July 18), 39 (journal), 46 (Madison's notes).

for a judicial role in impeachments, even adding a reference to it in the part of his draft about the executive power.³⁹² Randolph's third jurisdictional category was strikingly open-ended: "[T]o such other cases, as the national legislature may assign, as involving the national peace and harmony"³⁹³

Following that invitation were four more specific types of cases that presumably served as a finite list of what would meet the vague "national peace and harmony" standard.³⁹⁴ Though the "national peace and harmony" language had been in place since the Virginia Plan, each of Randolph's four specific instances, such as "the collection of the revenue" and "disputes between citizens of different states," had recently been edited out by the Convention.³⁹⁵

However provocative Randolph's unilateral expansion of the jurisdictional list may have been,³⁹⁶ he leavened it by deferring most of the expansion (all but the impeachments) to the discretion of the legislature, at least for the time being, perhaps awaiting further political will to coalesce at the Convention. Particularly in light of the precarious Madisonian compromise on the issue of whether to have inferior tribunals, it made sense not to push too hard but instead to punt to the legislature much of the difficult decision about just how far the Supreme Court's jurisdiction should extend.

The punt did not go far. The other coherent draft by the Committee of Detail was in the hand of James Wilson. Using Randolph's draft as a starting point, Wilson added to the list of cases in the Extension Clause. But he subtracted the qualifier "as the national legislature may assign."³⁹⁷ Nothing like it ever reappeared.

Just as the Madisonian compromise shows that the full Convention knew how to give Congress control of the shape of the judiciary, the Randolph and Wilson drafts show that the Committee of Detail knew how to cede control of the Supreme Court's jurisdiction. The dele-

³⁹² 4 *id.* at 37, 46 (Randolph draft); *see also* 2 *id.* at 137, 145 (Randolph draft); Glashauser, *supra* note 4, at 1407–08 (outlining Randolph's passion about the importance of a judicial role in impeachments).

³⁹³ 4 RECORDS, *supra* note 29, at 37, 48 (Randolph draft); *see also* 2 *id.* at 137, 147 (Randolph draft).

³⁹⁴ 4 *id.* at 37, 48 (Randolph draft showing two additional categories inserted by John Rutledge); *see also* 2 *id.* at 137, 147 (Randolph draft).

³⁹⁵ 2 *id.* at 37 (July 18), 39 (journal), 46 (Madison's notes).

³⁹⁶ Outside of the language about the judiciary, Randolph's draft also included various other provisions with no basis in the resolutions agreed to by the Convention. *See* STEWART, *supra* note 337, at 169–74 (summarizing the "innovations" of the Committee of Detail).

³⁹⁷ *See* 2 RECORDS, *supra* note 29, at 163, 172–73 (Wilson draft) (fleshing out the Extension Clause but omitting the phrase about legislative discretion).

gates' evident decision not to do so is unsurprising. Handing over the jurisdictional reins would have been a major concession by the Federalists. Indeed, the stakes rivaled those of the Madisonian compromise. Even if Congress decided not to establish inferior courts, at least litigants asserting a federal right would always have a chance to get to the Supreme Court, whether through original jurisdiction, on appeal, or by a discretionary writ.³⁹⁸ In contrast, if Congress were allowed to gut the Court's jurisdiction, there would be no such guarantee. The Supreme Court itself could become what Madison had feared of a government without inferior courts: "the mere trunk of a body without arms or legs to act or move."³⁹⁹

Such paralysis presents a separation-of-powers problem, and a limbless Supreme Court could also raise grave federalism concerns; depending on the existence and jurisdictional scope of inferior courts, litigants might need to rely on state courts to vindicate federal rights. Given the absence of recorded discussion about such a consequential outcome, the lack of any reference to the legislature in the final text of the Extension Clause, and the quick deletion of the one attempt in a draft to confer an explicit measure of legislative discretion over some components of the clause, it is inconceivable that the Convention designed the clause to allow Congress to strip the Supreme Court of its appellate jurisdiction.

CONCLUSION

When introducing his draft of the U.S. Constitution as part of the work of the Committee of Detail, Edmund Randolph summarized the first resolution the Convention had agreed on as "a declaration" that the three branches of the new government "shall be distinct, and independent of each other, except in specified cases."⁴⁰⁰ Though that lan-

³⁹⁸ After all, a premise of the compromise, as stated by an opponent of inferior courts, had been that even without inferior courts, "the right of appeal to the supreme national tribunal" would be "sufficient to secure the national rights & uniformity of Judgmts." *See* 1 *id.* at 115 (June 5), 124 (Madison's notes) (relating the comment of John Rutledge).

³⁹⁹ *See* 1 *id.* at 115 (June 5), 124 (Madison's notes) (describing "[a] Government without a proper Executive & Judiciary"); *see also supra* text accompanying note 346 (discussing Madison's metaphor).

⁴⁰⁰ 4 *id.* at 37, 38–39 (Randolph draft); *accord* 2 *id.* at 137, 138 (Randolph draft). That language may have been inspired by state documents such as the Maryland Declaration and Charter of Rights, which provided that "the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other." *See* MD. DECLARATION AND CHARTER OF RIGHTS of 1776, art. 6. That idea was echoed in the New Hampshire Bill of Rights, which provided that "the three essential powers . . . , to wit, the

guage was not drafted to be part of the Constitution itself and thus did not survive,⁴⁰¹ Randolph's insistence on explicitness when it came to one branch's power over another was likely shared by most if not all delegates to the Convention.⁴⁰² Nothing in Article III's extension of the judicial power specified subservience to legislative discretion. Yet today, the federal judiciary's independence is threatened by the widespread assumption that much of the "judicial" power—including the Supreme Court's appellate jurisdiction—is controlled by the legislature.

The independence of federal judges, in contrast, has long been recognized as a cornerstone of the federal judicial power. Section 1 of Article III provides that they "shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."⁴⁰³ That guarantee has been interpreted as protecting federal judges from worrying about financial reprisals for unpopular decisions.⁴⁰⁴ Even more significantly, a companion provision holds that judges "shall hold their Offices during good Behaviour."⁴⁰⁵ Though "good Behaviour" might seem to be in the eye of the beholder,⁴⁰⁶ that constitutional text has generally been interpreted as guaranteeing life

legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit" N.H. CONST. art. XXXVII (1784). The theory had many sources. *See, e.g.*, 1 BLACKSTONE, *supra* note 29, at *259–60 ("In this distinct and separate existence of the judicial power, . . . consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power.").

⁴⁰¹ According to Thomas Jefferson, its "spirit" survived, as he later wrote in a letter to Madison: "[The] principle [of the Constitution] is[] that of a separation of legislative, executive and judiciary functions, except in cases specified. If this principle be not expressed in direct terms, . . . it is clearly the spirit of the Constitution" Letter from Thomas Jefferson to James Madison (Jan. 22, 1797), in 9 THE WRITINGS OF THOMAS JEFFERSON 368 (Library Ed., Andrew A. Lipscomb & Albert Ellery Bergh, eds. 1904).

⁴⁰² Rutledge edited the introduction without changing those words, other than that he or someone else crossed out the word "except" after "distinct." 4 RECORDS, *supra* note 29, at 37–39 (Randolph draft); *accord* 2 *id.* at 137–38 (Randolph draft).

⁴⁰³ U.S. CONST. art. III, § 1.

⁴⁰⁴ *E.g.*, *O'Donoghue v. United States*, 289 U.S. 516, 531 (1933) ("In framing the Constitution, . . . the power to diminish the compensation of the federal judges was explicitly denied, in order . . . that their judgment or action might never be swayed in the slightest degree . . ."). As Alexander Hamilton explained, "*a power over a man's subsistence amounts to a power over his will.*" THE FEDERALIST No. 79, at 440 (Alexander Hamilton) (Clinton Rossiter et al. eds., 1999) (emphasis in original).

⁴⁰⁵ U.S. CONST. art. III, § 1.

⁴⁰⁶ *See* Robert Kramer & Jerome A. Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour,"* 35 GEO. WASH. L. REV. 455, 455–56 (1967) (querying whether Congress may define what counts as "good").

tenure⁴⁰⁷ (barring the sort of malfeasance that would trigger impeachment⁴⁰⁸). Together, the two clauses create a class of jurisprudentially independent judges.⁴⁰⁹

But like rights without remedies, judges are useless without jurisdiction. Section 2 of Article III addresses that truism by providing that “[t]he judicial Power shall extend” to nine categories of cases and controversies.⁴¹⁰ And yet the conventional view of congressional power disregards that parallel protection for jurisdictional independence, which if anything is more textually rooted than the life tenure provision. Acknowledging “shall . . . receive” and “shall hold” (in Section 1) as mandatory but twisting “shall extend” (in Section 2) into a legislative option leaves Congress room to undermine the judicial branch by withholding its power. Just as spurious is the argument that “[t]he judicial Power” in

⁴⁰⁷ E.g., *O'Donoghue*, 289 U.S. at 549–50 (referring to the “good behavior” clause in a statute creating a non-Article III court as a “life tenure” provision tracking that of Article III); *Shurtleff v. United States*, 189 U.S. 311, 316 (1903) (referring to the constitutional provision of “life tenure” for Article III judges); MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 83 (2d ed. 2000) (acknowledging the existence of a more stringent reading but noting the historical and structural support for a “life tenure” interpretation); Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 870, 904 & n.94 (1930) (noting that since the notorious 1804 impeachment and eventual acquittal of Justice Samuel Chase, the “good Behaviour” provision has been “generally understood” to be synonymous with life tenure); cf. *McAllister v. United States*, 141 U.S. 174, 190 (1891) (referring to “[t]he principles of life tenure and good behavior”); Kramer & Barron, *supra* note 406, at 456 (interpreting *McAllister* as implying that life tenure is conditioned on good behavior). But cf. RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 166–72 (enlarged ed. 1973) (arguing that misbehavior short of impeachable misconduct could warrant judicial removal).

⁴⁰⁸ See Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 697 (1969) (acknowledging room for uncertainty but concluding that impeachment is the only constitutional method for removing judges); Letter from Professor Henry M. Hart, Jr. to Harvard Crimson, *reprinted in* Note, *Recess Appointments to the Supreme Court—Constitutional but Unwise?*, 10 STAN. L. REV. 124, 127–28 n.12 (1957) (“‘Good behavior,’ of course, means for life, subject only to the extraordinary procedure for impeac[h]ment.”). Section 4 of Article II calls for removal of “civil Officers of the United States . . . on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. That provision has been widely assumed to apply to Article III judges. See Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 213 (1993) (not questioning that assumption); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 136–37 (approving of that assumption).

⁴⁰⁹ GERBER, *supra* note 338, at 28 (arguing that the Compensation Clause and the Good Behaviour Clause, as well as the Vesting Clause, “ensure the independence of the federal judiciary”); GERHARDT, *supra* note 407, at 83–84 (detailing the framers’ conception of “life tenure and irreducible compensation” as essential foundations of “truly independent judicial review”).

⁴¹⁰ U.S. CONST. art. III, § 2.

some sense extends but jurisdiction—the power to hear and determine cases and controversies—does not.

As is widely recognized, the drafters of the Constitution envisioned an independent judiciary that could operate without fear of legislative reprisal. What is often overlooked is that the judiciary necessarily consists of not only the judges themselves but also the abstract judicial power—including jurisdiction—that they wield. Together, Sections 1 and 2 of Article III declare for the Supreme Court a robust jurisprudential and jurisdictional independence.⁴¹¹

⁴¹¹ See Claus, *Constitutional Guarantees*, *supra* note 47, at 459 (referring to jurisdiction and tenure as “the two great pillars that raise up a vigorously independent judiciary”).